SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 184

THE STANDARD OIL COMPANY, AN OHIO CORPORATION,
Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO, AND JOHN J. CARNEY, AUDITOR OF CUYAHOGA COUNTY, OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT AS TO JURISDICTION

ISADOR GROSSMAN,
RUFUS S. DAY, JR.,
H. V. E. MITCHELL,
Counsel for Appellant.

McAFEE, GROSSMAN, TAPLIN, HANNING,
NEWCOMER & HAZLETT,
Of Counsel.

INDEX

Subject Index

Table of Cases Cited

Statutes Cited

IN THE SUPREME COURT OF OHIO

No. 32,060

THE STANDARD OIL COMPANY, AN OHIO CORPORATION,
Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO (SUBSTITUTED FOR C. EMORY GLANDER, FORMER TAX COMMISSIONER OF OHIO),

AND

JOHN J. CARNEY, AUDITOR OF CUYAHOGA COUNTY (SUBSTITUTED FOR JOHN A. ZANGERLE, FORMER AUDITOR OF CUYAHOGA COUNTY),

Appellees

STATEMENT IN SUPPORT OF JURISDICTION

The Standard Oil Company, an Ohio corporation, appellant herein, in support of the jurisdiction of the Supreme Court of the United States to review the above-entitled case on appeal, respectfully represents:

A

Statutory Provision Sustaining Jurisdiction

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is

Section 1257 of Title 28 of the United States Code, which provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

B

Statutes of Ohio, the Validity of Which Is Involved

The statutes of the State of Ohio, the validity of which has been sustained by final judgment of the Supreme Court of Ohio, the highest court of the State, as not being violative of or repugnant to the Constitution and laws of the United States, are Sections 5328 and 5325 of the General Code of Ohio. These sections read as follows:

> "Sec. 5328. *Property to be entered on general tax list and duplicate.*—All real property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom. All personal property located and used in business in this state and all

domestic animals kept in this state, whether used in business or not shall be subject to taxation, regardless of the residence of the owners thereof. All ships, vessels and boats, and shares and interests therein, defined in this title as 'personal property,' belonging to persons residing in this state, and aireraft belonging to persons residing in this state and not used in business wholly in another state, shall be subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property as prescribed in this title."

"Sec. 5325. *'Personal property' defined.*—The term 'personal property' as so used, includes every tangible thing being the subject of ownership, whether animate or inanimate, other than patterns, jigs, dies, drawings, money and motor vehicles registered by the owner thereof, and not forming part of a parcel of real property, as hereinbefore defined; also every share or portion, right or interest, either legal or equitable, in and to every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed at a collector's office, or within a collection district in this state, or not."

C

Date of Judgment and Date of Application for Appeal

The date of the final judgment of the Supreme Court of Ohio which is now sought to be reviewed was March 14, 1951, on which day the Supreme Court of Ohio delivered its opinion and entered its decision on its journal.

The date on which the Application for Appeal was presented to, and allowed by, the Chief Justice of the Supreme Court of Ohio was June 7, 1951.

D

Nature of Case and Rulings Below

Appellant is an Ohio corporation engaged primarily in producing, transporting, refining and marketing petroleum and its products. Its principal sources of crude oil are located in the southern and southwestern portions of the United States and its refineries are located in Ohio and Kentucky. During the period involved in this case appellant owned crude oil boats and barges which it employed in transporting oil from points on the lower Mississippi and Ohio Rivers to such points as Mt. Vernon, Indiana, and Bromley, Kentucky (R. I, 62 to 64).[1] The issue here involved is Ohio's right to tax the full value of these boats and barges under the following circumstances:

The great bulk of the operation of appellant's boats and barges during this period was on three regular routings: Memphis, Tennessee, to Mt. Vernon, Indiana; Memphis, Tennessee, to Bromley, Kentucky; and Baton Rouge or Gibson Landing, Louisiana, to Bromley, Kentucky, (R. I, 62)—Mt. Vernon, Indiana, and Bromley, Kentucky, being the two river terminals of appellant (R. I, 74, 75). The miles and "barrel miles" (number of miles multiplied by number of barrels of crude oil carried) traversed by each boat on each route during the period in question are shown on appellant's Exhibit 2 (R. II, 111).

Of the total river mileage traversed by appellant's boats and barges on any of their trips up the Mississippi and Ohio Rivers the maximum through waters bordering on Ohio was only 17½ miles. These 17½ miles were the 17½ miles of the Ohio River east of the Indiana-Ohio

[1] References are to volume and page number of the Record (R.) before the Ohio Supreme Court, which has been transmitted herewith.

border which the boats and barges had to traverse to get to Bromley, Kentucky, which is across the Ohio River from Cincinnati (R. I, 74, 76). Even these 17½ miles were not within the State of Ohio, since the southern border of Ohio is low water mark on the Ohio side of the river.

Thus, none of the regular operation of appellant's boats and barges was within Ohio, and only .7 of 1% of such operation on the mileage basis, or 1.27% thereof on the "barrel mile" basis was through waters which even bordered on Ohio (R. II, 111).

All major repairs of the boats and barges were made at Paducah, Kentucky, St. Louis, Missouri, or some other down-river point, and when they were dry-docked, they were dry-docked at these points (R. I, 79). The only time any of the boats or barges ever docked at an Ohio port during the years in question was when a boat, after discharging its cargo at Bromley, Kentucky, occasionally stopped at Cincinnati for a couple of hours for food, fuel or minor repairs, just as it frequently did at other ports farther south on the river. No cargo was ever unloaded or taken on at Cincinnati during the years in question (R. I, 84).

Appellant disclosed these boats and barges at a value of $1,017,518 in its Ohio Personal Property Tax Return for 1945, and at a value of $726,733 in its return for 1946. On audit, the Tax Commissioner of Ohio raised the value of the boats and barges to $1,322,863 for 1945 and to $1,303,907 for 1946 (see entries of Tax Commissioner for 1945 and 1946, attached hereto as Exhibits D and E, respectively).

In the Applications for Review and Redetermination which appellant filed with the Tax Commissioner of Ohio for each of the two years (R. II, 23, 98), appellant contended generally that the boats and barges should be eliminated from the assessments "because they are not subject to

personal property taxation under the laws of Ohio". Appellant did not in these applications contend specifically that taxation of the boats and barges would violate the Constitution of the United States, because the Tax Commissioner of Ohio had, under Ohio law, no authority to pass on the constitutionality of a statute.

However, after the Tax Commissioner had sustained the assessment of the boats and barges for both years, and appellant had appealed to the Board of Tax Appeals of Ohio, appellant, on October 18, 1948, filed for each of the years an identical "Amendment and Supplement to Notice of Appeal", contending that the boats and barges should be eliminated from the assessments (R. I, 37, 45). The grounds for this contention were stated as follows:

> "1. The taxation of such boats and barges by the State of Ohio for the year 1945 [1946] would violate the statutes of Ohio, since the use of such boats and barges in waters within or bordering on Ohio was insubstantial; and
>
> 2. The taxation of such boats and barges by the State of Ohio for the year 1945 [1946], even if permitted by the Ohio statutes, would deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, since such boats and barges had no taxable situs in Ohio for such year."

Thereafter, the case was heard and submitted to the Board of Tax Appeals upon the evidence and on the briefs and oral argument of counsel and on November 19, 1949 the Board made its entry, which is set forth in full as Appendix C hereof. So far as concerns the taxability of boats and barges, the Board first held unanimously that Sections 5328 and 5325 of the Ohio General Code specifically required the taxation of appellant's boats and barges, because they were used partly on waters bordering on Ohio, even though such

use was very slight. The Board then went on to hold, by a two to one vote, that it, like the Tax Commissioner, had no authority to pass on the constitutionality of the statute. The third member of the Board dissented on the ground that appellant's boats and barges were not "within Ohio" and that the Supreme Court of Ohio had previously held that there could be no taxation of property which was not within the state (R. I, 346).

On December 19, 1950, being within the time permitted by law, appellant filed its Notice of Appeal from the decision of the Board of Tax Appeals to the Supreme Court of Ohio. In its Assignment of Errors filed with the Supreme Court, appellant asserted (Assignments 2 and 3, B.T.A. Case No. 14,381, set forth in appellant's notice of appeal to the Supreme Court of Ohio):

> "2. The Board of Tax Appeals erred in failing to hold that the taxation of any of Appellant's crude oil boats and barges by the State of Ohio for the years 1945 and 1946 would violate the statutes of Ohio, in view of the fact that during such years such boats and barges were not used in Ohio, and their use in waters bordering on Ohio was insubstantial.
>
> 3. The Board of Tax Appeals erred in failing to hold that taxation of any of Appellant's crude oil boats and barges by the State of Ohio for the years 1945 and 1946, even if permitted by the Ohio statutes, would deprive Appellant of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution, since such boats and barges had no taxable situs in Ohio for either of such years."

On March 14, 1951 the Supreme Court of Ohio rendered its decision in this case. A copy of the court's syllabus and opinion is attached hereto as Exhibit B. As shown thereby, the court sustained the decision of the Board of Tax Appeals that taxation of appellant's boats and barges was

required by Sections 5328 and 5325 of the Ohio General Code. After reaching this conclusion, it proceeded to consider whether the statutes, as so construed, violated the United States Constitution. On this point, the court held, to quote the first syllabus, that

> "The tax levied on such boats and barges, pursuant to such statutory provisions, is not violative of the provisions of the Fourteenth Amendment of the Constitution of the United States."

In reaching this conclusion, the court accepted appellant's showing that appellant's boats and barges regularly operated on the waters of other states, and that only 17½ miles of the route traversed by the boats and barges, or 1.27% of the total of "barrel miles", were through waters which even bordered on Ohio. The court further conceded that under the decision of the Supreme Court of the United States in *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, appellant's boats and barges were probably taxable on an apportioned basis by all the states down the Ohio and Mississippi Rivers through whose waters they regularly navigated. However, in spite of these facts, the court concluded that, under the case of *Northwest Air Lines, Inc.* v. *Minnesota*, 322 U. S. 292, which was mentioned but not modified in the *Ott* case, the statutes of Ohio, appellant's domicile, taxing the entire value of appellant's boats and barges, were valid. With reference to the contention of appellant that if the river states could tax the boats and barges on an apportioned basis and Ohio could at the same time tax their entire value, the boats and barges would bear a multiple tax burden, the Supreme Court of Ohio stated:

> "The Supreme Court of the United States [in the *Ott* case] applied the rule to the taxation of tangible property which it had theretofore applied to the taxation of intangible personal property, that is, that such

property may be taxed both at its domiciliary situs and at the place where it had acquired a business situs."

The record in this case makes it clear that appellant contended that, if Sections 5328 and 5325 were construed to tax appellant's boats and barges, they were repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution. The syllabus and opinion of the Ohio Supreme Court make it clear that the court first construed these statutes to tax appellant's boats and barges, and then held that, as so construed, the statutes did not violate the Constitution of the United States. However, to preclude any possible question as to these facts, the Supreme Court of Ohio has executed, and made part of the record in this case, a certificate stating:

> "The appellant in its briefs and in its oral argument before this court contended that said statutes, as so construed, were invalid on the ground that they were repugnant to the Fourteenth Amendment of the Constitution of the United States and that appellee in its brief and oral argument contended the contrary. This court further certifies that it rejected appellant's contention and sustained the validity of said statutes under the United States Constitution."

A copy of the certificate of the Supreme Court of Ohio is attached hereto as Exhibit A.

Nor is there any question that the decision of the Ohio Supreme Court as to the taxability of appellant's boats and barges is a final decision. As shown by its opinion, this case also involved issues as to the taxation of other property of appellant for the years 1943, 1944, 1945 and 1946, and some of these other issues were remanded to the Board of Tax Appeals for further action. However, the opinion clearly shows that these other issues were entirely unrelated to appellant's boats and barges, and that, as to the boats and

barges, the court's decision was final. On this point, the certificate of the Supreme Court, attached hereto as Exhibit A, states:

> "The court further certifies that its decision with respect to the taxability of appellant's boats and barges for the years 1945 and 1946 is a final judgment of this court, and that the remand of the case to the Board of Tax Appeals leaves only ministerial acts to be performed by said Board and the Tax Commissioner of Ohio in accordance with this court's decision."

E

Substantiality of Questions Involved

The question in this case is whether Ohio has jurisdiction to tax the full value of boats and barges, owned by an Ohio resident, which are regularly operated through waters of other states, which are not operated through Ohio waters, which have only about 1% of their operation through waters which even border on Ohio, and which put into an Ohio port only occasionally and incidentally, or whether the statutes under which Ohio purports to tax the full value of such boats and barges are unconstitutional as a deprivation of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

That this question is substantial will be evidenced from the following:

1. The opinion of the Supreme Court of Ohio in this case is, so far as we know, the first reported opinion of any court holding that tangible property can at the same time be taxed by one state at an apportioned value and by another state at full value. It seems to us that this conclusion is contrary to a rule long applied by the United States Supreme Court that, while intangible property may constitutionally be subjected to multiple taxation, tangible

property is constitutionally immune therefrom. The most recent case reiterating this rule is *Curry* v. *McCanless*, 307 U.S. 357 (1939).

2. The decision of the Ohio Supreme Court in the instant case, holding that property which under the *Ott* case may clearly be taxed on an apportioned basis by the river states, may also be taxed at full value by the state of domicile of the owner, is inconsistent with the statement of the Supreme Court of the United States in the *Ott* case that, under the rule of apportionment which the court for the first time applied to river boats: "There is no risk of multiple taxation."

3. The Supreme Court of the United States in the *Ott* case held specifically that there is no practical difference taxwise between river boats and rolling stock, and that the same rule of apportionment applies to each of these classes of property. This being true, the decision of the Supreme Court of Ohio in the instant case is directly contrary to the decision of the United States Supreme Court in the leading case of *Union Refrigerator Transit Company* v. *Kentucky*, 199 U.S. 194 (1905).

That case involved a Kentucky corporation which owned a fleet of cars which it rented to shippers who used them all over the United States. While there was no showing that all of the cars were outside Kentucky throughout any year, it was shown that the average number of cars used in Kentucky during the years in question ranged from 28 to 67, or from one to three percent, out of a total of 2,000 cars. In spite of this fact Kentucky, as the domicile of the owner, attempted to tax the entire value of the fleet. The Supreme Court of the United States, however, held that taxation by Kentucky of the entire fleet was violative of the due process clause of the Fourteenth Amendment, since such a large proportion of the cars was employed and lo-

cated in states other than Kentucky and were properly taxable in such other states.

4. The Supreme Court of Ohio rested its decision in the instant case on the authority of *Northwest Air Lines, Inc.* v. *Minnesota*, 322 U.S. 292 (1944), which it noted "was mentioned in the opinion in the *Ott* case but was neither modified nor limited in any way." However, the court disregarded the following fundamental distinctions between the *Northwest* case and the instant case:

(a) In the *Northwest* case, 14 to 16% of the regular route and plane mileage of the air line was within Minnesota. In the instant case, no part of the route of the boats and barges was within Ohio, only .7 of 1% of the mileage, or 1.27% of the "barrel mileage" was through waters bordering on Ohio, and the only stops ever made by the boats in an Ohio port were occasional and sporadic, and not for the purpose of loading or unloading, but only for food or minor repairs.

(b) In the *Northwest* case the maintenance bases of the air line, where the planes were overhauled and repaired, were in Minnesota. In the instant case, appellant had no terminals in Ohio and its boats were never dry-docked or overhauled in Ohio, all repairs of any consequence being made at Paducah, Kentucky, St. Louis, Missouri, or some other down-river point.

(c) In the *Northwest* case the United States Supreme Court stated that denial to Minnesota of the right to tax the full value of the airplanes "would free such floating property from taxation everywhere." The *Ott* case, *in which the facts were identical in all essentials with those of the instant case*, makes it clear that the boats and barges involved in the instant case are subject to taxation on an apportioned basis by all the river states through whose waters they regularly operate.

We submit that it is of great importance to the owners of boats and other facilities of transportation and to state taxing authorities, that this court make it clear whether boats, which under the *Ott* case are taxable on an apportioned basis by the river states, are to be free from full value taxation by the states where their owners are domiciled, or whether the Supreme Court of Ohio was right when it stated in its opinion in the instant case that:

> "The Supreme Court of the United States [in the *Ott* case] applied the rule to the taxation of tangible property which it had theretofore applied to intangible personal property, that is, that such property may be taxed both at its domiciliary situs and at the place where it had acquired a business situs."

Appellant, of course, recognizes that no actual assessment on the basis of apportionment has yet been made by any of the river states against its boats and barges. However, as indicated by the Supreme Court of Ohio, the State of Kentucky has asserted the right to tax the boats and barges on an apportioned basis, and inasmuch as its Court of Appeals has recently held that its statutes permit the levying of such a tax (*Reeves* v. *Island Creek Fuel & Transportation Company*, 230 S. W. 2d 924 (1950)) the great likelihood is that the State of Kentucky and some of the other river states will endeavor to exercise this taxing right. Apart from this, it is well established that no right to tax is conferred on a state which has no jurisdiction to tax, merely because the state which has jurisdiction has failed to exercise its right to do so.

McAfee, Grossman, Taplin, Hanning,
Newcomer & Hazlett,
Attorneys for Appellant.

Isadore Grossman,
Rufus S. Day, Jr.,
H. V. E. Mitchell,
Of Counsel.

EXHIBIT A

Certificate of the Supreme Court of Ohio

No. 32,060

IN THE SUPREME COURT OF OHIO

THE STANDARD OIL COMPANY, an Ohio Corporation, Appellant,

vs.

C. EMORY GLANDER, Tax Commissioner of Ohio, and JOHN A. ZANGERLE, Auditor of Cuyahoga County, Appellees

---

Appeal From the Board of Tax Appeals

Certificate As to the Court's intent to hold Sections 5328 and 5325 General Code of Ohio to be Valid and Not Repugnant to the Fourteenth Amendment of the Constitution of the United States

The Supreme Court of Ohio hereby certifies that, when it held, in the first syllabus of its decision in the above case, that Sections 5328 and 5325 of the Ohio General Code:

> "* * * authorized the taxation, at their true value, of boats and barges owned by an Ohio corporation and operated partly on the Mississippi River and partly on the waters of the Ohio River adjacent to the State of Ohio,"

and that:

> "The tax levied on such boats and barges, pursuant to such statutory provisions, is not violative of the pro-

visions of the Fourteenth Amendment of the Constitution of the United States",

it intended thereby, as evidenced by this court's opinion in the case, to hold that the said statutes required boats and barges so owned and operated to be taxed at their true value, and that as so construed said statutes were valid and in no respect violative of or repugnant to the Fourteenth Amendment of the Constitution of the United States.

The court further certifies that the appellant in its briefs and in its oral argument before this court contended that said statutes, as so construed, were invalid on the ground that they were repugnant to the Fourteenth Amendment of the Constitution of the United States and that appellee in its brief and oral arguments contended the contrary. This court further certifies that it rejected appellant's contention and sustained the validity of said statutes under the United States Constitution.

The court further certifies that its decision with respect to the taxability of appellant's boats and barges for the years 1945 and 1946 is a final judgment of this court, and that the remand of the case to the Board of Tax Appeals leaves only ministerial acts to be performed by said Board and the Tax Commissioner of Ohio in accordance with this court's decision.

It is hereby ordered that this certificate, which is concurred in by all of the Judges of the court, be made part of the record in this case.

CARL WEYGANDT,
Chief Justice.

EXHIBIT B

Opinion of the Supreme Court of Ohio

THE STANDARD OIL CO., *Appellant*,

v.

GLANDER, TAX COMMR., ET AL., *Appellees*

Taxation—Personal property—Boats and barges of Ohio corporation—Operated on Mississippi and Ohio rivers—Sections 5325 and 5328, General Code—Machinery and equipment in process of construction—"Used" in business, when—Section 5328-1, General Code—Valuation—Obsolescence and functional depreciation to be considered—Machinery inefficient and uneconomical due to change in business conditions—Board of Tax Appeals—Decision refusing reduction in valuation unreasonable and unlawful, when—Article XIV, Amendments, U. S. Constitution.

1. The provisions of Section 5328, General Code, that "all ships, vessels and boats, * * * defined in this title as 'personal property,' belonging to persons residing in this state * * * shall be subject to taxation," and the provisions of Section 5325, General Code, defining "personal property" as including "every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed at a collector's office, or within a collection district in this state, or not," authorize the taxation, at their true value, of boats and barges owned by an Ohio corporation and operated partly on the Mississippi river and partly on the waters of the Ohio river adjacent to the state of Ohio. The tax levied on such boats and barges, pursuant to such statutory provisions, is not violative of the provisions of the Fourteenth Amendment of the Constitution of the United States.

2. The provisions of Section 5325-1, General Code, that "personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not," authorize the taxation of personal property "kept and maintained as a part of a 'plant' capable of operation." The word "plant" as used in such section is to be construed and applied as commonly understood in its ordinary acceptation and significance. Machinery and equipment designed for the production of gasoline, which are in the process of erection and construction as an addition to an operating oil refinery, constitute a part of "a plant capable of operation" and are subject to taxation by virtue of the provisions of Section 5325-1, General Code, as property "used in business."

3. Where property, due to a change in business conditions, has become obsolete, it is unreasonable and unlawful, in determining the valuation of such property for taxation purposes, not to take into consideration that machinery especially designed and constructed during a war period for the manufacture of high octane aviation gasoline, but which machinery is no longer used for such purposes by reason of the fact that the demand for such aviation gasoline has ceased, was subsequently devoted to the manufacture of other motor fuels in which such machinery is inefficient and uneconomical in operation. Such facts are competent and pertinent evidence of obsolescence and functional depreciation and are essential factors in the determination of the value of the property for tax purposes. (*B. F. Keith Columbus Co.* v. *Board of Revision of Franklin County*, 148 Ohio St., 253, approved and followed.)

4. Where a taxpayer returns its tangible personal property at a valuation in excess of the book value thereof, although filing no claim for reduction from book value under Section 5389, General Code, in connection therewith, pays the tax theretofore determined thereon, and upon audit omitted property claimed by the taxpayer to be not subject to tax is added and assessed by the Tax Commis-

sioner, from which assessment an appeal is taken under Section 5611, General Code; it is unreasonable and unlawful for the Board of Tax Appeals, upon finding that the taxpayer was entitled to a reduction in valuation in a sum which would not reduce the total value of the property assessed below the book value thereof, as shown by the taxpayer in his return, to refuse such reduction on the grounds that such tax has been paid and the time for issuance of the final amendment certificate by the Tax Commissioner has expired during such appeal. (*Wright Aeronautical Corp.* v. *Glander, Tax Commr.*, 151 Ohio St., 29, distinguished.)

(No. 32060—Decided March 14, 1951.)

APPEAL from the Board of Tax Appeals.

The appellant is The Standard Oil Company, an Ohio corporation, and the appellees are C. Emory Glander, Tax Commissioner of Ohio, and John A. Zangerle, auditor of Cuyahoga county.

This appeal from the Board of Tax Appeals involves the final orders and tax assessments made by the Tax Commissioner with respect to and on certain tangible personal property of the appellant for the tax years 1943, 1944, 1945 and 1946, respectively. Three separate appeals to the Board of Tax Appeals were prosecuted by the appellant which were consolidated in the hearing by that board. One of the appeals, involving the validity of a final assessment by the Tax Commissioner for the year 1945, was decided in favor of the appellant and no appeal was prosecuted to this court. The appeal to this court is limited to the decision of the Board of Tax Appeals in regard to Tax Commissioner's case No. 12488, which involves a final assessment certificate and an amendment thereof assessing taxes for the tax years 1943 and 1944 on a Houdry catalytic cracking unit which was in the process of construction on January 1, 1943, and on January 1, 1944, but which was not completed and not in operation on either of those tax-listing dates, and Tax Commissioner's case No. 14381, which is an appeal from final orders of the Tax Commissioner

assessing taxes for the tax years 1945 and 1946, respectively, on certain towboats and barges of the appellant, the then finished and operating Houdry catalytic cracking unit above referred to and certain machinery and equipment in process of construction which were unfinished and not in operation on January 1, 1945, and January 1, 1946.

The decision of the Board of Tax Appeals affirmed in most respects the orders and assessments in each of these causes, and the appellant, by appeal to this court, presents the question whether the decision of the Board of Tax Appeals is unreasonable or unlawful.

Messrs. McAfee, Grossman, Taplin, Hanning, Newcomer & Hazlett and Mr. Rufus S. Day, Jr., for appellant.

Mr. Herbert S. Duffy, attorney general, and Mr. Donald B. Leach, for appellee Tax Commissioner.

MATTHIAS, J.

The appellant has assigned numerous errors with respect to each of the two appeals considered by the Board of Tax Appeals and which the board determined adversely to appellant. These assignments have been summarized in the brief of the appellant and will be discussed in the order therein stated.

The first questions of law presented are: Did the state of Ohio have jurisdiction, under Section 5325, General Code, to assess taxes for the years 1945 and 1946 upon certain boats and barges of the company which were not in use in Ohio and the use of which in waters bordering on Ohio was insubstantial, and is such assessment violative of the Fourteenth Amendment of the Constitution of the United States?

The record discloses that in its 1945 personal property tax return the appellant listed three towboats and 31 barges at a depreciated book value of $1,017,518, and in 1946 listed boats and barges having a depreciated book value of $726,733. The Tax Commissioner on audit raised the valuation of the boats and barges for 1945 to a true value of $1,322,863 and raised the valuation for 1946 to a true value of $1,303,907. Thereafter, within time, the ap-

pellant filed its application for review and redetermination for 1945 and 1946, contending, first, that its crude oil boats and barges, which carried crude oil from various points on the Mississippi river, up the Mississippi and Ohio rivers, to points in Indiana and Kentucky, were not taxable in Ohio under Section 5325, General Code, for the reason that they were not used in Ohio and their use in waters bordering on Ohio was insubstantial and, therefore, taxation of these boats and barges by the state was violative of the due process clause of the Fourteenth Amendment of the United States Constitution.

The crude oil boats and barges involved constituted the greater part of the valuation upon which the taxes assessed were based. The remainder of the assessed value represented gasoline boats and barges engaged in transporting gasoline to various points in Ohio. These latter boats and barges are not involved in the controversy.

The contentions of the appellant were rejected in their entirety by the Tax Commissioner on review and redetermination. Upon appeal the Board of Tax Appeals held that, under Section 5325, General Code, with the exception of one small boat valued at $3,500, the oil boats and barges of the appellant were taxable in Ohio. The board announced that, being an administrative tribunal, it had no jurisdiction to decide the constitutional question presented.

The facts upon which the appellant bases its claim of want of jurisdiction of the state to levy such tax are as follows:

These crude oil boats and barges, during 1944 and 1945, were engaged in transporting oil from various points on the lower Mississippi river to Mount Vernon, Indiana, and Bromley, Kentucky. The crude oil unloaded at Mount Vernon, Indiana, was moved from that point by pipe line to various destinations, and the oil unloaded at Bromley, Kentucky, was likewise moved to the appellant's refinery at Latonia, Kentucky.

The appellant introduced evidence to show the number of miles traversed and the number of barrels of oil carried by each boat on each routing during the years 1944 and 1945. This evidence showed that the greater bulk of the opera-

tion of these boats during each year was over three routes —Memphis, Tennessee, to Mount Vernon, Indiana, Memphis, Tennessee, to Bromley, Kentucky, and Baton Rouge or Gibson, Louisiana, to Bromley, Kentucky; and that of the total river-route mileage traversed by the appellant's crude oil boats and barges from the lower Mississippi river to Bromley, Kentucky, only 17½ miles was through waters bordering on the state of Ohio.

In an attempt to arrive at a percentage figure the appellant computed these activities on a basis of "barrel miles" (number of miles multiplied by number of barrels carried) and found that the percentage of barrel miles on the portion of the river bordering on Ohio was, in 1944 and 1945, 1.27 per cent of the total barrel miles. If is claimed that none of the barrel miles was actually within the state of Ohio since its border is the low water mark on the Ohio side of the river and the boats and barges were operated south of the border.

These crude oil boats and barges were registered from Cincinnati but, except for short stops for food, fuel or minor repairs, never were docked at Cincinnati, all repairs being made at Paducah, Kentucky, St. Louis, Missouri, or some other down-river point. No cargoes were ever taken on at Cincinnati during the years 1944 and 1945.

The appellant contends that, even if the company's crude oil boats and barges were constitutionally within Ohio's jurisdiction, Section 5325, General Code, should not be so construed as to authorize taxation thereof.

Section 5328, General Code, provides in part as follows:

"All ships, vessels and boats, and shares and interests therein, defined in this title as 'personal property,' belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, shall be subject to taxation."

Section 5325, General Code, defines "personal property" as follows:

"* * * every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively

or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere and whether it has been enrolled, registered, or licensed at a collector's office, or within a collection district within this state, or not."

The appellant contends that its boats would be taxable in Ohio only if they were "used or designed to be used exclusively or partially in navigating any waters within or bordering on this state"; that, since the boats and barges were being used exactly as "designed," the only question under the statute is whether the actual use made of the boats and barges during the years in question brought them within the provisions of the statute.

The company contends that although this statute purports to tax boats operating in waters bordering on Ohio, it should not be construed to apply to boats whose use in waters within or bordering on Ohio was insubstantial. This contention is based upon the maxim, *de minimis non curat lex*. The decision of the Supreme Court of the United States in the case of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S., 680, 90 L. Ed., 1515, 66 S. Ct., 1187, is cited in support of that contention. That case involved portal to portal pay.

Both the Tax Commissioner and the Board of Tax Appeals refused to adopt that interpretation of Section 5325, General Code. We quote from the decision of the Board of Tax Appeals:

"Section 5366, General Code, characterizes as 'taxable property' all the kinds of property mentioned or referred to in the above quoted provisions of Section 5328, General Code. Section 5371, General Code, provides generally that personal property used in business shall be listed and assessed in the taxing district in which such business is carried on. This section, however, further provides as follows:

"'Ships, vessels, boats and aircraft, and shares and interests therein, shall be listed and assessed in the taxing

district in which the owner resides.' Inasmuch as it appears that at all of the times here in question these boats and barges were used in part in navigating the waters of the Ohio river bordering on this state, such boats and barges as the property of the appellant, an Ohio corporation having its domicile in this state, were clearly taxable under the expressed terms of the above noted statutory provisions."

We are in accord with that statement for it clearly appears that under the facts disclosed by the record such crude oil boats and barges were not used exclusively in another state and, therefore, came within the provisions of Section 5328, General Code.

Since these crude oil boats and barges came within the provisions of Sections 5325 and 5328, General Code, the contention of the appellant that the boats and barges were not within the jurisdiction of the state of Ohio for tax purposes becomes pertinent. The appellant contends that tangible personal property is not constitutionally subject to multiple taxation and, therefore, is taxable only by the state in which it has its situs. Further, appellant contends that under the decision of the Supreme Court of the United States in the recent case of *Ott, Commr.*, v. *Mississippi Valley Barge Line Co.*, 336 U. S., 169, 93 L. Ed., 585, 69 S. Ct., 432, river boats are subject to taxation only in accordance with the rule of proportionate taxation heretofore applied in the taxation of the rolling stock of railroads. This contention requires an examination of that case for if it is applicable to the boats and barges owned by the appellant, there is now no provision in the laws of Ohio under which they may be taxed.

The facts in the *Ott case, supra,* are set forth in the opinion, as follows:

"Appellees are foreign corporations which transport freight in interstate commerce up and down the Mississippi and Ohio rivers under certificates of public convenience and necessity issued by the Interstate Commerce Commission. Each has an office or agent in Louisiana but its principal place of business is elsewhere. The barges and towboats,

which they use in this commerce are enrolled at ports outside Louisiana; but they are not taxed by the states of incorporation.

"In the trips to Louisiana a tugboat brings a line of barges to New Orleans where the barges are left for unloading and reloading. Then the tugboat picks up loaded barges for return trips to ports outside that state. There is no fixed schedule for movement of the barges. But the turnarounds are accomplished as quickly as possible with the result that the vessels are within Louisiana for such comparatively short periods of time as are required to discharge and take on cargo and to make necessary and temporary repairs.

"Louisiana and the city of New Orleans levied ad valorem taxes under assessments based on the ratio between the total number of miles of appellees' lines in Louisiana and the total number of miles of the entire line. The taxes were paid under protest and various suits, which have been consolidated, were instituted in the District Court by reason of diversity of citizenship for their return, the contention being that the taxes violated the due process clause of the Fourteenth Amendment and the commerce clause."

Following the citation and analysis of the cases wherein the court had evolved the rule that vessels are taxable solely at the domicile of the owners, save where they had acquired an actual situs elsewhere, the Supreme Court of the United States concluded as follows:

"We see no practical difference so far as either the due process clause or the commerce clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce. The problem under the commerce clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' *Nashville, C & St. L. Ry.* v. *Browning*, 310 U. S., 362, 365 [, 84 L. Ed., 1254, 1255, 60 S. Ct., 968]. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded

by the taxing state. See *Wisconsin* v. *J. C. Penny Co.*, 311 U. S., 435, 444 [, 85 L. Ed., 267, 270, 61 S. Ct., 246, 130 A. L. R., 1229]. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state.

"There is such an apportionment under the formula of the *Pullman case*. Moreover, that tax, like taxes on property, taxes on activities confined solely to the taxing state, or taxes on gross receipts apportioned to the business carried on there, has no cumulative effect caused by the interstate character of the business. Hence there is no risk of multiple taxation. Finally, there is no claim in this case that Louisiana's tax discriminates against interstate commerce. It seems therefore to square with our decisions holding that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each state may impose on the activities or property within its borders. See *Western Live Stock* v. *Bureau of Revenue*, 303 U. S., 250, 254, 255 [, 82 L. Ed., 823, 826, 827, 58 S. Ct., 546, 115 A. L. R., 944], and cases cited. We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises."

As hereinbefore stated, the question before the Supreme Court of the United States in the *Ott case* was whether the state of Louisiana and the city of New Orleans could levy ad valorem taxes based upon a mileage percentage figure. The appellant in the instant case contends that that decision has the effect of substituting a new formula for the long established rule of taxation whereby states, wherein the owners of watercraft are domiciled, can tax such boats to their full value as other personal property so owned is taxed. It is to be noted however, that this conclusion must be reached by inference from the language used in the *Ott case*. It is not within the scope of the facts there presented or the decision rendered thereon.

Other recent decisions of the Supreme Court of the United States are more directly in point; cases in which that court recognized the right of the domiciliary state to

levy the full ad valorem tax on personal property passing through other states in interstate commerce.

In the case of *Northwest Airlines, Inc.*, v. *Minnesota*, 322 U. S., 292, 88 L. Ed., 1283, 64 S. Ct., 950, the question presented was stated by Mr. Justice Frankfurter, as follows:

"The question before us is whether the commerce clause or the due process clause of the Fourteenth Amendment bars the state of Minnesota from enforcing the personal property tax it has laid on the entire fleet of airplanes owned by the petitioner and operated by it in interstate transportation. The answer involves the application of settled legal principles to the precise circumstances of this case. To these, about which there is no dispute, we turn."

The pertinent facts therein were as follows:

"Northwest Airlines is a Minnesota corporation and its principal place of business is St. Paul. It is a commercial airline carrying persons, property and mail on regular fixed routes, with due allowance for weather, predominantly within the territory comprising Illinois, Minnesota, North Dakota, Montana, Oregon, Wisconsin and Washington. For all the planes St. Paul is the home port registered with the Civil Aeronautics Authority, under whose certificate of convenience and necessity Northwest operates. At six of its scheduled cities, Northwest operates maintanance bases, but the work of rebuilding and overhauling the planes is done in St. Paul. Details as to stopovers, other runs, the location of flying crew bases and of the usual facilities for aircraft, have no bearing on our problem.

"The tax in controversy is for the year 1939. All of Northwest's planes were in Minnesota from time to time during that year. All were, however, continuously engaged in flying from state to state, except when laid up for repairs and overhauling for unidentified periods. On May 1, 1939, the time fixed by Minnesota for assessing personal property subject to its tax (Minn. Stat. 1941, Section 273.01), Northwest's scheduled route mileage in Minnesota was 14% of its total scheduled route mileage, and the scheduled plane mileage was 16% of that scheduled. It based its personal

property tax return for 1939 on the number of planes in Minnesota on May 1, 1939. Thereupon the appropriate taxing authority of Minnesota assessed a tax against Northwest on the basis of the entire fleet coming into Minnesota. For that additional assessment this suit was brought. The Supreme Court of Minnesota, with three judges dissenting, affirmed the judgment of a lower court in favor of the state, [*State* v. *Northwest Airlines, Inc.*,] 213 Minn., 395, 7 N. W. (2d), 691. A new phase of an old problem led us to bring the case here. [*Northwest Airlines, Inc.*, v. *Minnesota*,] 319 U. S., 734 [87 L. Ed., 1695, 63 S. Ct., 1031]."

In holding that the state of Minnesota was authorized to levy a tax upon "all personal property of persons residing therein, including the properties of corporations," the court reviewed its decisions in previous cases and held that the doctrine of tax apportionment for instrumentalities engaged in interstate commerce introduced in *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S., 18, 35 L. Ed., 613, 11 S. Ct., 876, was inapplicable. Relying on the case of *People, ex rel. New York Central & Hudson River Rd. Co.*, v. *Miller*, 202 U. S., 584, 50 L. Ed., 1155, 26 S. Ct., 714, the court stated:

"Here, as in that case, a corporation is taxed for all its property within the state during the tax year none of which was 'continuously without the state during the whole tax year.' * * * The fact that Northwest paid personal property taxes for the year 1939 upon 'some proportion of its full value' as its airplane fleet in some other state does not abridge the power of taxation of Minnesota as the home state of the fleet in the circumstances of the present case."

It is to be noted that the *Northwest Airlines case* was mentioned in the opinion in the *Ott case*, but it was neither modified nor limited in any way. In its essential facts the *Northwest Airlines case* is similar to the instant case. It involved a tax by the domiciliary state whereas the *Ott case* involved the validity of a tax by a state other than the domiciliary state. We do not believe the *Northwest Airlines case* and the *Ott case* are in conflict. The Supreme Court of the United States applied the rule to the taxation of

tangible personal property which it had theretofore applied to the taxation of intangible personal property, that is, that such property may be taxed both at its domiciliary situs and at the place where it had acquired a business situs.

It is pertinent to note that in the instant case we are not considering the taxation of the property of a public utility engaged in interstate transportation but rather the taxability of property of a domestic corporation which operated both within and beyond the limits of this state. Further, since the company here is not a public utility, there is no provision under the statutes of this state for the establishment of any mileage, barrel mileage, time period or other arbitrary classification, and this court is entirely without authority to select any apportionment method and adopt it as the correct applicable principle. That is purely a legislative function and, as hereinbefore stated, if the tax levied is unconstitutional it follows that there is no liability therefor whatever. The record does not disclose that any other state taxed these boats and barges, although there is an inference that Kentucky is now asserting its right to do so. We conclude that the levying of the tax in question was not violative of the Fourteenth Amendment of the Constitution.

We come now to the question of machinery and equipment in process of construction.

The company included no machinery in process of construction in its personal property tax returns for the years 1943, 1944, 1945 and 1946, claiming such property was not taxable. The Tax Commissioner, on audit for those years, found such machinery to be taxable and added to the assessment certificate for 1943 and 1944 the value, at book cost, of the unfinished Houdry catalytic cracking plant, assessed the machinery in each of those years at 50 per cent of cost and allowed a further reduction in book cost of 12 per cent, because he found that book cost exceeded the "true value" by such percentage.

The unfinished Houdry plant was the only machinery in process of construction involved in the 1943 and 1944 assessment, and the plant was completed by January 1, 1945. However, in the tax years 1945 and 1946, the company

had other machinery, the bulk of which constituted an unfinished thermal gas plant located at Cleveland. The Tax Commissioner added these to the tax assessment certificate for the years 1945 and 1946, valuing them at 50 per cent of the book value.

The company contends that such machinery was not taxable in any of those years and that the Houdry plant should have been given a reduced valuation by reason of the excessive cost of construction on account of war emergency conditions existing at the time of the erection of that plant and of obsolescence.

The Tax Commisioner held that the machinery in process of construction was "used in business" within the definition of that term in Section 5325-1, General Code. The pertinent part of that section reads as follows:

"Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise * * *"

The Board of Tax Appeals held that the clause, "when kept and maintained as a part of a plant capable of operation, whether actually in operation or not," covers machinery in process of construction.

The company and the Tax Commissioner are in disagreement as to the meaning of the words, "kept," "maintained" and "part of a plant capable of operation," disclosing that the limited language used in the section in defining "used in business" requires our consideration.

It is the contention of the company that the words, "kept and maintained," as applied to the machinery herein, contemplate machinery completed and operative, since machinery is not maintained until it first has been completely constructed. The Tax Commissioner ascribes to the words a broader meaning which includes retaining possession of

the machinery, and asserts that its retention and prevention of corrosion and other deterioration constitute "maintaining" within the definition of the term.

Much more divergence of view occurs when the parties hereto define the word, "plant." The company defines the word, "plant," as including only the Houdry catalytic cracking plant and the Thermal cracking plant and claims that, since each of these, of itself, was machinery in process of construction for the tax years in question, it necessarily could not be "part of a plant capable of operation," for it was not completed.

In the view of the Tax Commissioner the "plant" consisted of the entire operating refinery and included its many operating units among which were the Houdry catalytic cracking plant and the Thermal cracking plant, and consequently these units, even while under construction, were parts of a "plant capable of operation."

The Board of Tax Appeals, in construing Section 5625-1, General Code, *supra*, made the following observation:

"It is to be observed however that the above noted provisions of Section 5325-1, General Code, were not enacted with special reference to either appellant's refineries at Cleveland or elsewhere or to petroleum refineries generally in this state. And in this view recognition must be given to the general definition that in an industrial or commercial sense, a 'plant' includes real estate and all else that represents capital invested in the means of carrying on a business, exclusive of raw material or the manufactured product. This leads to the conclusion that as to the refinery property of the appellant each refinery as a whole at its location in Cleveland or elsewhere is 'a plant' within the meaning of Section 5625-1, General Code. Inasmuch as each unfinished item or [*sic*] machinery and equipment here in question was a part of a refinery or 'plant' capable of operation and in actual operation and was kept and maintained as such, it was property 'used' and 'used in business' within the meaning of the taxing statutes here under consideration."

In our view such application of Section 5625-1, General Code, is in accord with the well established rule that words

of a statute, in common use or other than terms of art or science, will be construed in their ordinary acceptation and significance and with the meaning commonly attributed to them. *Mutual Bldg. & Investment Co.* v. *Efros*, 152 Ohio St., 369, 89 N. E. (2d), 648.

The following statement from 37 Ohio Jurisprudence, 546, Section 290, is pertinent:

"Courts should be slow to impart any other than their natural and commonly understood meaning to terms employed in the framing of a statute. Too narrow a construction of terms is not favored. Statutory phraseology should not be given an unnatural, unusual, strained, arbitrary, forced, artificial, or remote meaning which may, in its last analysis, be technically correct but wholly at variance with the common understanding of men. A technical construction of words in common use is to be avoided."

We hold that the decision of the Board of Tax Appeals that the Houdry catalytic cracking plant and the Thermal cracking plant, although under construction, constituted machinery "kept and maintained as a part of a plant capable of operation" was not unreasonable or unlawful.

Having determined that the Houdry plant, with other machinery, was subject to taxation while in the process of construction, the question directly presented is whether the valuation thereof by the commissioner, as corrected and modified by the Board of Tax Appeals, constituted the true value thereof.

The principal contention of the company as to assessed value relates to the Houdry catalytic cracking plant. That plant was a war project and was constructed to produce aviation gasoline much needed during the war, and because of the urgent need for and shortage of such fuel the company necessarily expended large sums of money in overtime wages and for required materials, with a result that the plant cost $2,419,102.76 more to construct than the estimate furnished by the construction company. Both the company and the Tax Commissioner agree that the part of such "overrun," or excessive cost of construction,

which did not add value to the property, should be eliminated from the assessed value thereof. The difference between the parties in that regard is primarily one of fact—the company urging that the amount of "overrun" should be $1,423,852, whereas the Tax Commissioner held it to be $977,777.

On appeal, the Board of Tax Appeals fixed the amount of such excess costs at $1,200,000. The company contends that, on a percentage basis, the book value should be reduced by 15.64 per cent. The Board of Tax Appeals made this percentage 13.18 per cent of cost. These figures, of course, involve the value of the plant as completed but are likewise applicable to the plant when under construction in 1943 and 1944. These percentages were used by the Board of Tax Appeals, together with a depreciation allowance for the years it was used after completion, resulting in a valuation for tax year 1943 at $377,580, 1944, $5,399,459, 1945, $6,593,502 and 1946, $5,899,439.

The company contends that the figure arrived at by the Board of Tax Appeals not only failed to give sufficient allowance for the excess cost of construction or "overruns" but also made inadequate allowance for obsolescence of the Houdry catalytic cracking plant which it contends became partially obsolete at the termination of the war because the process of catalytic cracking had been replaced by more efficient methods.

The Houdry plant consisted of several units, which were a six-case unit, a three-case unit and foundations for another three-case unit which has never been constructed. The record discloses that the three-case unit was originally built as a special attachment to the six-case basic Houdry unit to assist the six-case unit in producing as large a quantity of high octane gasoline as possible during the war. Its function was to treat oil, which had been partly processed in the six-case unit, in such manner as to step up its octane rating for aviation purposes. That use terminated with the war, and the only use of the three-case unit during the year 1946 was in the manufacture of motor gasoline.

The record discloses that the three-case unit was inefficient in operation, not yielding as large a percentage of

motor fuel from the oil processed as the larger regularly designed unit, resulting in a higher cost of operation.

The company claims that in the year 1946 it was entitled to a deduction from the value of this Houdry plant in the sum of $1,292,077 for obsolescence of the three-case unit and for the foundation of the three additional cases which were never built. The Board of Tax Appeals did regard the base for the additional cases as to some extent idle equipment and consequently reduced the value thereof from $135,000 to $13,500, but refused to allow any reduction by reason of the claimed obsolescence of the three-case unit. The board considered it as a part of the Houdry catalytic cracking plant as a whole and as an operating unit thereof and applied to it the same rate of reduction for depreciation and overrun as were determined applicable to the remainder of the plant.

Evidence in the record supports the determination of the Board of Tax Appeals that the "overruns" totaled $1,200,000, and its decision in that respect was not unreasonable or unlawful. However, the refusal of the Board of Tax Appeals to make some allowance for obsolescence of the three-case unit was unreasonable and unlawful in that the Board of Tax Appeals failed to apply the principles established by this court in the case of *B. F. Keith Columbus Co.* v. *Board of Revision of Franklin County,* 148 Ohio St., 253, 74 N. E. (2d), 359. The syllabus of that case provides as follows:

"1. In determining the value of property for the purpose of taxation, the assessing body must take into consideration all factors which affect the value of the property.

"2. Functional depreciation occurs where property, although still in good physical condition, has become obsolete or useless due to changing business conditions and thus for all practical considerations is of little or no value to the owner of such property.

"3. Where the evidence shows that, due to a change of business conditions, property has become obsolete, it is unreasonable for the assessing body not to consider this factor of functional depreciation in arriving at the tax value."

The facts in regard to the limited use of this three-case unit were not in dispute and require some allowance for the disclosed obsolescence. The failure of the Board of Tax Appeals to make such determination renders their decision as to the value of the Houdry plant for the year 1946 unreasonable and unlawful and requires a reversal of the order in that regard and a remand to the board for the redetermination of the correct true value of such plant for the year 1946.

At the conclusion of the proceeding before the Board of Tax Appeals, an application for rehearing was filed by the company wherein it protested the failure of the board to reduce the value of the machinery and equipment in the full amount of the excess valuation theretofore determined by it.

For the year 1945 the company failed to file a claim for deduction from book value (form 902) for the taxable property of the company, as disclosed by its inter-county return, so that, when the machinery in process of construction (the thermal plant) was added to the return, the sum of all the property listed exceeded the book values originally returned in the inter-county tax return by the sum of $561,027.

When the Tax Commissioner determined that the excess cost of construction or "overrun" on the Houdry plant was $988,000, he allowed only the sum which the true valuations as determined exceeded the listed book values, or a reduction in the sum of $561,027. The company contends that since all such property was in Cuyahoga county wherein the true value of the property found exceeded the book value by the sum of $900,002, the latter sum should have been allowed.

However, the company having concededly paid taxes on a basis in excess of the book values of personal property in Cuyahoga county as stated in its inter-county tax return, the Board of Tax Appeals held that as to the year 1945 any question of reducing the assessed tax values below those on which the company had paid the tax was moot and should not be considered, and allowed no reduction.

The company contends that the payment of the tax on the higher basis shown by the return did not render the question

involved moot, but on the contrary the reduction should have been allowed because the classified tax law permits the refund to a taxpayer of a tax he has already paid but which, on appeal, is held not to have been owed. That contention is based on the provisions of Section 5395, General Code, which provides in part as follows:

"Excepting as to any taxable property concerning the assessment of which an *appeal has been filed* under Section 5611 of the General Code, the Tax Commissioner may finally assess the taxable property required to be returned by any taxpayer * * * for any prior year or years within the time limited therefor in Section 5377 of the General Code * * *." (Emphasis supplied.)

The Board of Tax Appeals in its decision admits, in effect, that the taxpayer was entitled to a reduction in valuation in the sum of $900,002, but states, in effect, that, because the appeal was determined after the time for issuance of the final assessment certificate by the Tax Commissioner had expired and the tax had been paid, such reduction would be ineffective. The payment of the tax when due to avoid interest and penalties and when accompanied by a proper appeal protects all the taxpayer's rights until all administrative and judicial review thereof is completed.

Where a taxpayer is required by law to file an inter-county return he is not thereby precluded from claiming the rights of a taxpayer filing a return in a single county. (*Wright Aeronautical Corp.* v. *Glander, Tax Commr.*, 151 Ohio St., 29, 84 N. E. [2d], 483, distinguished.)

The decision of the Board of Tax Appeals is not unreasonable or unlawful except as to its refusal to make proper allowance for obsolescence in the year 1946 and its refusal to grant the taxpayer proper reduction to book values for the year 1945 as above indicated.

The cause is accordingly remanded to the Board of Tax Appeals for further proceeding in accordance with this opinion.

Decision affirmed in part and reversed in part.

WEYGANDT, C. J., ZIMMERMAN and HART, JJ., concur.

STEWART and TAFT, JJ., concur, except in paragraph two of the syllabus and the portion of the opinion relating thereto.

MIDDLETON, J., not participating.

TAFT, J., concurring. I have considerable doubt about paragraph two of the syllabus. However, I reach the same result on another ground. The Houdry plant, even before it was "capable of operation," was at that time "acquired or held as means or instruments for carrying on the business" within the meaning of the words found in Section 5325, General Code. At that time, the Houdry plant might not be so "held" but it was so "acquired." The words "acquired or held" are in the disjunctive.

STEWART, J., concurs in the foregoing concurring opinion.

EXHIBIT C

Opinion and Entry of the Board of Tax Appeals of Ohio

BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT OF TAXATION OF OHIO

Consolidated cases Nos. 12488, 14381 and 14514

THE STANDARD OIL COMPANY, Cleveland Ohio, Appellant,

v.

C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee.

Nov. 19, 1949

ENTRY

These several causes and matters came on to be heard and considered by the Board of Tax Appeals on appeals heretofore filed by the appellant above named, and Ohio cor-

poration, from final orders and tax assessments made by the tax commissioner on and with respect to certain tangible personal property of the appellant for the tax years 1943, 1944, 1945 and 1946, respectively. Case No. 12488 is an appeals filed herein from a final assessment certificate and amendment thereof assessing for the tax years 1943 and 1944, respectively, a Houdry catalytic cracking unit which was in process of construction on January 1, 1943, and on January 1, 1944, but which was unfinished and not yet in operation on each of said tax listing dates. Case No. 14381 is before the Board on two appeals, as amended, from final orders of the tax commissioner here in question for the tax years 1945 and 1946, respectively, on certain towboats and barges of the appellant company, on the then finished and operating Houdry catalytic cracking unit, above referred to, and on certain machinery and equipment in process of construction which was unfinished and not in operation on January 1, the tax listing day in each of said tax years. Case No. 14514 is an appeal from a final assessment certificate of the tax commissioner for the tax year 1945, which tax certificate was made and issued after the appeal for said tax year in case No. 14381 was filed herein; and aside from the question of the authority of the tax commissioner to make such final assessment, the issues presented in this appeal are the same as those noted in the appeal in case No. 14381, so far as the tax assessments in question for the year 1945 are concerned. These cases were heard and submitted to the Board on said several and respective appeals, on transcripts of the proceedings of the tax commissioner relating to the several tax assessments complained of, on evidence offered and introduced by the parties on a consolidated hearing of the cases before an examiner of the Board and on the briefs of counsel.

The first question presented to the Board on the hearing and submission of these cases is that presented in the appeals as amended for the tax years 1945 and 1946 in case No. 14381, with respect to the taxability of certain towboats and barges which were owned by the company on tax listing day in said tax years, and which were used by it in the transportation of petroleum and petroleum products on the

Mississippi and Ohio Rivers during the years 1944 and 1945. As to this it appears that the company listed these towboats and barges in the personal property tax returns which it made as an inter-county corporation for the tax years 1945 and 1946, respectively, and that the tax commissioner assessed these boats and barges on the basis of a true value of the same in the amount of $1,322,863 for the tax year 1945 and on the basis of the true value of $1,303,907 for the tax year 1946—the assessment in each case being on a list or assessed valuation of 70% of the determined true valuation. Of the boats and barges returned for taxation by the company in said tax years certain boats and barges having a true valuation of $109,541 for the tax year 1945, and $102,022 for the tax year 1946, were used by the company in transporting gasoline from the company's refinery at Latonia, Kentucky, to various Ohio River points in this state. No question is made in this case by the appellant with respect to the boats and barges so used. The other boats and barges of the company, the taxability of which is a question at issue in this case, were used by the company for the transportation of crude oil from Gibson Landing in the state of Louisiana and from other points on the Mississippi River, up that river and up the Ohio River to Mt. Vernon, Indiana, where the company had a pipe line terminal, and to Bromley, Kentucky, from which point crude oil was delivered for use at the company's refinery at Latonia, Kentucky.

These boats and barges in transporting crude oil to the company's pipe line terminal at Mt. Vernon, Indiana, did not, of course, reach that part of the waters of the Ohio River which border on the State of Ohio; while these same boats and barges in transporting crude oil to Bromley, Kentucky, a point across the river from Cincinnati, Ohio, traverse the waters bordering on this state for a distance of only 17½ miles—the distance from the Ohio-Indiana line to Bromley. And, apparently, no part of the movement of these boats and barges is in waters within the territory of the State of Ohio—which territory extends only to low water mark on the Ohio side of the river—, unless it be on relatively infrequent occasions when empty boats nose

into the dock at Cincinnati for minor repairs or for the purpose of taking on food supplies.

In this situation the appellant contends that these boats and barges were not taxable under the provisions of section 5328 and other related sections of the General Code, for the tax years here in question, for the stated reasons (1) that the navigation of the waters of the Ohio River bordering on this state were so inconsequential that these boats and barges did not have the character of "personal property within the purview of section 5325, General Code," and (2) that consistently with the requirement of due process in the taxation of property of this kind the state was not authorized to make the tax assessments here in question. In this connection it may be observed that inasmuch as it appears that the taxes assessed on these boats and barges for the tax years 1945 and 1946 have been paid (Rec. p. 16), it may well be doubted whether anything more than a moot question is here presented with respect to the taxability of this property for said tax years. See The Central Iron and Metal Co. v. Evatt, 27 O. O., 1.

Passing this point, however, and addressing ourselves to the merits of the question presented on this assignment of error, it is noted that section 5328, General Code, provides, among other things, that:

> "All ships, vessels, and boats, and shares and interests therein, defined in this title as 'personal property,' belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, shall be subject to taxation."

Section 5325, General Code, defining the term "personal property" for purposes of taxation includes in this term "every share or portion, right, or interest, either legal or equitable, in and to every ship, vessel, or boat, of whatsoever name or description used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed

at a collector's office, or within a collection district in this state, or not."

Section 5366, General Code, characterizes as "taxable property" all the kinds of property mentioned or referred to in the above quoted provisions of section 5328, General Code. Section 5371, General Code, provides generally that personal property used in business shall be listed and assessed in the taxing district in which such business is carried on. This section, however, further provides as follows:

> "Ships, vessels, boats and aircraft, and shares and interests therein shall be listed and assessed in the taxing district in which the owner resides."

Inasmuch as it appears that at all of the times here in question these boats and barges were used in part in navigating the waters of the Ohio River bordering on this state, such boats and barges as the property of the appellant, an Ohio corporation having its domicile in this state, were clearly taxable under the expressed terms of the above noted statutory provisions. In this connection it is pertinent to note, further, that by section 5388, General Code, it is provided, with certain exceptions not here important, that personal property shall be listed and assessed at seventy per centum of the true value thereof, in money, on the day as of which it is required to be listed.

As to the constitutional question presented by appellant in its assignment of error with respect to the taxation of these boats and barges for said tax years, it may be observed that the above noted statutory provisions relating to the taxation in this state of property of this kind, were enacted in apparent recognition of the then established rule that consistently with the requirement of due process of law in the taxation of property of this kind, ships, vessels and boats which are designed for and are used in navigating the high seas, the Great Lakes or the inland waters of this country were taxable only at the domicile of the owner or owners of such property, unless such ships, vessels or boats have acquired an actual situs in another

state by being engaged in navigation wholly within the limits of such other state. *Pioneer Steamship Company* v. *Evatt*, 18 O. O., 510, 514, and cases therein cited; *Ott* v. *Mississippi Valley Barge Line Company* (U. S. Supreme Court case No. 244), decided February 7, 1949; 93 L. Ed.—Advance Opinions—431, 434. This rule that in a situation such as that here presented, property of this kind can be taxed only at the domicile of the owner, has been limited by the decision of the United States Supreme Court in the case of *Ott* v. *Mississippi Valley Barge Line Company, supra,* wherein it was held that a state other than that which is the domicile of the owner of boats and barges navigating the waters of the Mississippi and Ohio Rivers, may levy a tax extended on the proportionate value of such boats and barges represented by the total number of miles of the lines of navigation by such boats and barges in the taxing state as compared to the total number of miles of the entire line of navigation in said rivers. As to this it may be observed, however, that it does not appear in the facts of the above cited case that the boats and barges there in question had been taxed in the state where the owner thereof was incorporated and had its domicile. Moreover, neither in the *Ott case* nor in any other case which has come to our attention has it been expressly held that the domiciliary state has not the power and authority to levy a tax on property of this kind extended on the value of such property or upon some stated statutory percentage thereof. If it be thought that the decision of the Supreme Court of the United States in the *Ott case* in some of its implications has the effect of limiting the above noted statutory provisions of this state providing for the taxation of the boats and barges here in question so as to render unconstitutional the taxes here in question on this assignment of error, it may be observed that the Board of Tax Appeals as an administrative and quasi judicial tribunal will not assume jurisdiction and authority to consider and determine such constitutional question. *National Distillers Products Corp.* v. *Glander*, 49 Abs., 330, 337. See *Hillsborough Township* v. *Cromwell*, 326 U. S., 620, 625, 90 L. Ed., 358, 364; *Schwartz* v. *Essex County Board of Taxa-*

tion, 120 N. J. L., 129, 132, affirmed 130 N. J. L., 177. In the case last above cited it was said:

> "It is undisputable that the determination of the constitutionality of an act of the legislature rests with a judicial body; not with a quasi judicial body such as the State Board of Tax Appeals. The final responsibility to pass upon the constitutionality of a given piece of legislation rests in the courts and it is the duty of the various state agencies and administrative bodies to accept a legislative act as constitutional until such time as it has been declared to be unconstitutional by a qualified judicial body."

In this situation and in view of the fact that no question is here made as to either the true or list values of the boats and barges of the appellant for said tax years, the tax assessments here in question are affirmed except as to the assessments on the M. V. Mt. Vernon, a small towboat having a value of about $3500, and which during the years 1944 and 1945 did not navigate any of the waters of the Ohio River bordering on this state; as to the assessments on this boat the order of the tax commissioner is reversed.

A further question submitted to the Board on the presentation of this case is that as to the taxability of certain machinery and equipment of various kinds which were in process of construction on January 1 in the tax years 1943, 1944, 1945 and 1946, respectively, but which as to the particular machinery and equipment here in question were unfinished and not in operation on said several tax assessment dates. This question with respect to the tax years 1943 and 1944 is presented on an assignment of error in the appeal filed herein as case No. 12488, and relates to an unfinished Houdry catalytic cracking unit at the company's refinery at Cleveland, the construction of which commenced in August 1942 but the construction of which was not completed until about July 1, 1944. By January 1, 1945, the Houdry catalytic cracking plant had been completed and put in operation. However, on that date the company had in process of construction in various counties of the state certain other items of machinery and equipment which were

unfinished and not in operation on said date. Likewise on January 1, 1946, there were in process of construction in several different counties of the state certain items and units of machinery and equipment which were unfinished on said tax assessment date. The principal part of the property referred to in this connection was an unfinished thermal gas plant at the company's Cleveland refinery.

The appellant company in filing its combined tax returns as an inter-county corporation for the tax years above referred to, did not as to any of such tax years list any item or unit of machinery and equipment which was in process of construction and unfinished upon tax assessment day in such year. As to this the appellant company admitted that the materials which were incorporated in these unfinished items or units became the property of the company upon delivery of the same to the several grounds upon which this machinery and equipment was being constructed. And it is further conceded by the appellant that these unfinished structures, representing the labor and material which had gone into the same, had the character of personal property—so far as the question here under consideration is concerned. And there is no dispute about the fact that these several structures were constructed for the purpose and in connection with the business of the appellant which it was conducting at these several locations.

As to this, the contention of the appellant is that these unfinished items or units of machinery and equipment were not "used," within the purview of section 5328 and related sections of the General Code which generally and with respect to property of this kind, limit the taxation of tangible personal property to that which is "located" and "used in business in this state." In this connection it is noted that section 5325-1, General Code, defining the term "used in business" as well as the term "business," itself, provides:

> 'Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part

of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; * * *. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Further as to this it appears that the refinery of the appellant at its Cleveland location and likewise, presumably, those at other locations as well, consist of a number of units each of which has more or less independent functions in the manufacture of petroleum products of different kinds. Each of such units is customarily referred to in the industry as a "plant." In this view the appellant contends that an unfinished item of machinery and equipment is obviously not "a part of a plant capable of operation" within the purview of section 5325-1, General Code, and that such unfinished item was not, therefore, "used in business" under section 5328 and other sections of the General Code providing for the taxation of tangible personal property. It is to be observed, however, that the above noted provisions of section 5325-1, General Code, were not enacted with special reference to either appellant's refineries at Cleveland or elsewhere or to petroleum refineries generally in this state. And in this view recognition must be given to the general definition that in an industrial or commercial sense, a "plant" includes real estate and all else that represents capital invested in the means of carrying on a business, exclusive of raw material or the manufactured product. This leads to the conclusion that as to the refinery property of the appellant each refinery as a whole at its location in Cleveland or elsewhere is "a plant" within the meaning of section 5325-1, General Code. Inasmuch as each unfinished item of machinery and equipment here in question was a part of a refinery or "plant" capable of operation and in actual operation and was kept and maintained as such, it was property "used" and "used in business" within the meaning of the taxing statutes here under consideration.

By appropriate assignments of error in the appeals above referred to the appellant has presented to this Board ques-

tions relating to the taxable values of this unfinished machinery and equipment for the several tax years above noted. It is thought to be appropriate, however, to defer the consideration of these questions until we have considered the questions herein presented with respect to the taxable valuation of the Houdry catalytic cracking plant as a completed and operating unit for the tax years 1945 and 1946, respectively.

As above noted herein case No. 14381 on the docket of the Board includes appeals filed herein by the appellant, above noted, from final orders of the tax commissioner which modified and, as modified, confirmed an increased personal property tax assessment against the appellant for each of the tax years 1945 and 1946. One of the personal property tax units involved in this case, both as to the tax years 1945 and 1946, was the Houdry catalytic cracking plant, so-called, which was constructed primarily as a war facility for the purpose of producing high octane gasoline for aviation purposes in connection with the war effort. The construction of this plant was completed in June 1944 and the same as to the personal property comprised therein was taxable as such for said tax years as a part of the appellant's machinery and equipment at its Cleveland refinery, in Cleveland Taxing District, Cuyahoga County, Ohio. The total cost of constructing this catalytic cracking plant which consisted of a six case cracking unit, a three case cracking unit and auxiliary structures and equipment, was $9,099,360.39. The greater part of this construction work was done by the E. B. Badger and Sons Company of Boston, Massachusetts, under a contract therefor with the appellant company at a cost of $7,669,032.76; and the balance of the work in the construction of this plant or unit—which consists principally in the installation of auxiliary equipment—was performed by The Standard Oil Company itself at a cost of $1,430,327.65. The contract of the Badger Company for the work to be done by it was based on an overall definitive estimate of $5,249,930, including labor and material as well as the contractor's fee in the amount of $566,880. It thus appears that as compared with the estimate there was an overrun in that part of the work done by the Badger

Company under its contract with the appellant in the amount of $2,419,102.76. The appellant concedes that a part of this overrun amounting to the sum of $995,250 was due to additional items or other factors entering into the work done by the contractor, which were beyond that contemplated by the contract and which resulted in increased value to the completed work done by the Badger Company in the construction of this plant. Appellant contends however that the balance of said overrun, amounting to $1,423,852 represented increased costs and expenses which were occasioned by unavoidable delays in the construction of said work and by other conditions of such nature, and that these increased costs and expenses in the amount herein stated did not add anything to the value of the completed plant; and that there should be an initial deduction of this amount from the total cost of the project as one of the steps in determining the true value of the completed unit for the tax years here in question. As to this the tax commissioner apparently concedes that of the total amount of this overrun the sum of $988,000 thereof represents costs and expenses which were not reflected in the value of the completed plant or unit. This overrun allowance made by the Department of Taxation and tax commissioner was on a percentage basis which was in line with an overrun allowance theretofore made by the tax commissioner with respect to a catalytic cracking plant of like kind constructed by another oil refining company in this state in the year 1939, at which time conditions affecting construction work of the kind here in question were obviously different from the conditions which obtained during the war years when the plant here in question was constructed. Moreover, the overrun allowance made by the Department of Taxation and by the tax commissioner in the amount above stated was, apparently, limited to some extent by the erroneous view entertained in the Tax Department that the catalytic cracking plant or unit of the appellant as constructed and completed was capable of processing fifty per cent more fuel as feed stock in the production of gasoline than that contemplated by the contract based upon the estimate above referred to. As to this it appears that this catalytic crack-

ing plant as completed and put in operation then was and now is capable of processing daily 15,000 barrels of fuel oil as feed stock in the production of gasoline; and that this capacity of the plant was contemplated by the parties in the execution of the Badger Company contract for its construction. In this situation it is a matter of some difficulty to determine the amount of the overrun on the cost and expense of constructing this project due to costs and expenses which are not reflected in the value of the plant as completed for operation. However, on a consideration of all of the evidence in this case we are of the view that an allowance of $1,200,000 should be made on this account; and that a deduction of this amount should be made from the overall cost and expense of constructing the plant for the purpose of determining that part of the cost of such construction which is related to the true value thereof as a completed structure.

The appellant further contends that the construction cost of this plant as reduced by the overrun allowance should be further reduced by bringing such cost down to the construction cost level for the year 1939, which year, the appellant assumes, was the last year in which construction costs were reasonably normal. The construction work on this project was largely done in the year 1943, at which time construction costs, the appellant claims, were abnormally high as compared with those for the year 1939. In this connection it appears from the evidence (appellant's exhibit 15) that taking the figure 100 as the index basis for construction cost in the year 1913 the index for construction costs for the year 1943 was 290 and that for the year 1939 was 236; which last named index figure is 81.4% of that for the year 1943. And appellant's contention is that this percentage should be applied to the net cost of the construction of the plant as above determined for the purpose of bringing such cost down to the 1939 level as an index to the true value of the plant as constructed. As to this it is noted from the evidence that following the year 1939 and through the war years there was a steady and substantial increase in construction cost, and that following the end of the war there was a tremendous increase in construction cost; so that during the year 1947

the index for such cost for said year on the basis above noted was about 390 as compared with the index figures given with respect to the years 1939 and 1943. And based upon information readily available in engineering journals and other like sources, judicial knowledge can be taken of the fact that construction costs for the years 1948 and 1949 were substantially higher than those for the year 1947. It is apparent that construction cost during the latter part of the year 1942, during the year 1943 and during the first half of the year 1944, during which time this plant was under construction, were substantially less than the average of such construction costs from the year 1939 to 1949, inclusive. In this situation and inasmuch as no one can readily foresee the time when construction costs will be comparable to those for the year 1939 or to those for the year 1943, for that matter, we are of the view that consistently with the rule that in the determination of true value of a fixed asset of this kind such value should be considered as something fairly constant over a period of time, and that while the assessment of such property is made as of a day certain the value thereof is established over a period of years, we can without injustice to the appellant take the actual net construction cost of this catalytic cracking plant as above determined as an index of its true value for tax purposes. In this view appellant's contention that the actual net cost of this plant should be reduced to the 1939 cost level, must be denied.

Giving effect to the figures above found and determined and deducting $1,200,000 as the amount of the overrun from $9,099,360, the overall cost of the Houdry catalytic cracking plant, we obtain $7,899,360 as a figure representing that part of the cost of the plant contributing to the value of the plant as completed. As to this it appears, however, that 10.6% of this cost amounting to $837,332, was for the construction and installation of structures and equipment which were properly classified as real property. Deducting this sum from $7,899,360 leaves us $7,062,028 as that part of the cost which is reflected in the value of the plant as personal property. It further appears, however, that of the amount last named the sum of $135,000 represents the cost of constructing foundations for an additional three case cracking unit

as a part of the plant, which was never completed; and which foundations, as idle equipment were given a value of $13,500 instead of $135,000, the cost of constructing the same. Making a proper adjustment of these figures we arrive at a valuation of the plant as personal property as of July 1, 1944, in the amount of $6,940,528. Giving to this figure as the valuation of the plant as of July 1, 1944, a depreciation of 5%, amounting to $347,026, we determine the true valuation of the plant as personal property on and as of tax listing date, January 1, 1945, to be $6,593,502.

A further question presented in this case with respect to the assessment of appellant's machinery and equipment in Cleveland City Taxing District for the tax year 1945—including, of course, the Houdry Catalytic cracking plant above referred to—is on an assignment of error that the tax commissioner on consideration of the appellant's application for review and redetermination as to the assessment complained of did not allow a reduction of the valuation of such machinery and equipment to or under the book value thereof notwithstanding the fact that the appellant did not for said tax year file any (902) claim as authorized and provided for by section 5389, General Code. As to this it appears that the appellant in filing its inter-county or consolidated personal property tax return for the tax year 1945 set out its machinery and equipment in Cleveland City Taxing District at a book valuation of $10,591,041. However the appellant did not in said tax return list this property as machinery and equipment used in manufacturing at a 50% valuation based on the book value of the property; but it did list this property at a 50% valuation based upon the true value of this machinery and equipment, which true value was set out in said tax return as $11,491,043, and which true value as returned by appellant was apparently the book value of this machinery and equipment as depreciated in accordance with the 302 formula prescribed by the tax commissioner which had been in effect for some years. And it further appears in this connection that the appellant paid the taxes for said tax year on this machinery and equipment on a list or assessed valuation based on this true value of the property as returned by the appellant. And apparently,

the appellant paid the taxes on its machinery and equipment in this taxing district upon an assessment certificate directed to it and to the county auditor by the tax commissioner under date of August 13, 1945, after the tax commissioner had made an audit of appellant's tax return for said year. In this assessment certificate the tax commissioner set out the *assessed value* of all of the appellant's tangible personal property in Cleveland City Taxing District at $8,684,960. And in making this assessment certificate it does not appear that the tax commissioner in making his audit of appellant's tax return increased or otherwise changed either the true valuation or list valuation of appellant's machinery and equipment in said taxing district as the same were set out in said tax return. Thereafter on February 11, 1947, the tax commissioner on reaudit of appellant's personal tax return for the year 1945 increased the *assessed* valuation of all of the appellant's tangible property in Cleveland City Taxing District from $8,684,960, as above stated, to $8,887,540—an increase of the list or assessed valuation of such property in the amount of $202,580. It does not appear, however, that the tax commissioner in making this increase in the *list* or assessed valuation of appellant's tangible personal property in Cleveland City Taxing District increased or otherwise changed the valuation of appellant's Houdry catalytic cracking plant or other machinery and equipment in the taxing district. On the contrary it appears that this increase in the list or assessed value of such tangible personal property was due solely to an adjustment and resulting increase made by the tax commissioner in the valuation of the appellant's inventory property at this location.

Following the receipt of this amended certificate of valuation made by the tax commissioner, the appellant on March 12, 1947, filed with that officer an application for review and redetermination of said amended assessment in which no complaint is made as to the only increase made in and by said amended assessment, but in which, among other things, the appellant said:

"Our claim is that the aggregate assessed value of tangible property in Cleveland, shown on the amended

preliminary assessment certificate as $8,887,540.00 should be reduced by $2,373,630.00 since the listed value of the machinery and equipment at the Catalytic Cracking Plant in our Cleveland refinery should be not $3,873,636, the amount for which it was assessed in the amended preliminary assessment certificate, but $1,500,000.00."

Assuming that the *list* or *assessed* value of the Houdry catalytic cracking plant was $3,873,636, as stated by the appellant in its application for review and redetermination, it follows that since this catalytic cracking plant as machinery and equipment used in manufacturing was listed at 50% of its true value both in the amended assessment certificate and in the original assessment certificate, the true value of this catalytic cracking plant as the same was returned for taxation by the appellant as a part of all its machinery and equipment in the Cleveland City Taxing District must have been $7,747,272.

In this situation it appeared when this application for review and redetermination came on for consideration by the tax commissioner that the true value of all the machinery and equipment owned and used by the appellant in refining in Cleveland, Cuyahoga County, and upon the basis of which the appellant paid taxes on such property for the year 1945, was $900,002 more than the book value of such machinery and equipment as returned by the taxpayer for said year. The tax commissioner upon consideration of the application for review and redetermination found that the catalytic cracking plant above referred to was "assessed in excess of the true value thereof in the amount of $988,000 by reason of allowable excessive costs and equipment not in use but that in view of the judicial determination (Willys-Overland Motors, Inc. v. Evatt, 141 O. S., 402) he is without jurisdiction to find a value below net depreciated book value and orders that the value of such property be reduced in the amount of $561,027.00 being the amount that the machinery and equipment used in manufacturing in Cuyahoga County exceeded the net depreciated book value thereof, and it is ordered that a final assessment certificate issue correcting the assessment in

the amount so stated." This figure of $561,027, above noted, was the amount by which the true value of all machinery and equipment used by the appellant in refining throughout the state as the same was returned by the appellant exceeded the book value thereof as set out in appellant's tax return. And the tax commissioner, apparently, used this figure in making the reduction above noted instead of the figure of $900,002 as intended. The tax commissioner after giving effect to the reduction made by him as above noted and after making certain increases in the valuation of this machinery and equipment in the aggregate amount of $47,425 due to an adjustment of depreciation rates as to some items of such property and to the valuation of certain items of machinery and equipment in progress of construction, fixed the valuation of such machinery and equipment in Cleveland Taxing District in the sum of $10,977,441.

Although the tax commissioner on the consideration of the appellant's application for review and redetermination had no jurisdiction and authority to reduce the valuation of this machinery and equipment below the book value thereof in the absence of a 902 claim for such reduction, Willys-Overland Motors, Inc. v. Evatt, Tax Commr., 141 O. S., 402; Wright Aeronautical Corp. v. Glander, Tax Commr., 151 O. S., 29, said officer upon his finding of an overrun in the cost of constructing said catalytic cracking plant, would have been warranted in reducing the valuation of the machinery and equipment in this taxing district down to the sum of $10,591,041, the book value thereof, were it not for the fact that the appellant had previously paid taxes on this property at a higher valuation. As to this it will be recalled that the appellant returned this machinery and equipment for taxation at a true valuation of $11,491,043 including, apparently, said catalytic cracking plant at a valuation of $7,747,272; and taxes were paid by the appellant for the tax year 1945 on the basis of this true value of the property as returned by the taxpayer. In this situation the question presented to the Board of Tax Appeals upon this appeal as to the right of the taxpayer to a reduction in the valuation of this machinery

and equipment from the valuation of $11,491,043, at which it was returned by the appellant for purposes of taxation to the sum of $10,591,041, the book valuation of this property, is a moot question which this Board is not authorized or required to determine. The Central Iron and Metal Co. v. Evatt, 27 O. O. 1. See Board of Education v. Budget Commission, 139 O. S. 312, 313; Minor v. Witt, 82 O. S. 237; Travis v. Public Utilities Commission, 123 O. S. 355. It follows, therefore, that the final order made by the tax commissioner on appellant's application for review and redetermination (assuming, but not deciding, that said application was timely and properly filed) with respect to the true valuation of appellant's machinery and equipment including said catalytic cracking plant in Cleveland City Taxing District for the tax year 1945, must be, and hereby is, affirmed; and this notwithstanding the fact that, as above noted, this Board has herein found and determined that the true value of said catalytic cracking plant on and as of January 1, 1945, was substantially less than the valuation at which this plant was returned for taxation and upon which the taxes were paid.

A further question presented in case No. 14381 is on an appeal by the appellant from a final order of the tax commissioner on appellant's application for review and redetermination with respect to the valuation of said Houdry catalytic cracking plant for the tax year 1946. As to this it appears that the appellant in its personal property tax return for the tax year 1946 returned its machinery and equipment in Cleveland City Taxing District at a true value of $4,082,711; which valuation did not include that of the Houdry catalytic cracking plant, the cost of which plant as a war facility had been depreciated or amortized down to zero on the books of the company. However, the 902 claim filed by the appellant with its tax return states that the valuation of the machinery and equipment in the Cleveland Taxing District as returned by the appellant "should be increased by $3,000,000 to reflect and include the true value of the Houdry unit." On August 12, 1946, the tax commissioner issued a preliminary assessment cer-

tificate on and with respect to the tangible personal property returned for taxation by the appellant for said tax year. Thereafter, on or about the month of December 1946, the tax commissioner made a reaudit of appellant's tax return for said year in which that officer found and determined that the true value of said catalytic cracking plant for the tax year 1946 was $6,916,129; and adding this amount to the valuation of the machinery and equipment other than said catalytic cracking plant returned by the appellant as aforesaid, the tax commissioner determined the true valuation of appellant's machinery and equipment in the Cleveland Taxing District to be $10,998,840. Following this reaudit the tax commissioner made and certified an amended assessment certificate including therein the assessed value of the Houdry plant as determined on said audit. Following the certification of this amended preliminary tax assessment the appellant filed with the tax commissioner an application for review and redetermination in which it stated that the true value of the machinery and equipment in the catalytic cracking unit, as of January 1, 1946, was $3,000,000, and that it should accordingly be included in its 1946 personal property tax assessment at a listed value of $1,500,000 instead of $3,458,060, the listed value at which the tax commissioner included it in his amended preliminary assessment certificate.

The tax commissioner upon consideration of appellant's application for review and redetermination allowed a reduction of $932,360 from the cost of the construction of said catalytic cracking unit by reason of excessive costs not contributing to the value of the unit; and giving effect to such reduction in the original cost of the construction of this unit, the tax commissioner determined that this catalytic cracking plant or unit had a valuation on and as of January 1, 1946, of $5,983,769. And the tax commissioner after including certain machinery and equipment which the appellant had failed to list in its tax return, some of which was in process of construction, determined that all of the appellant's machinery and equipment in Cleveland Taxing District had a valuation of $10,960,267 for the tax year 1946.

On the presentation of this case to the Board of Tax Appeals on this appeal, the appellant upon considerations above discussed and to some extent denied herein contends that this Houdry catalytic cracking plant as personal property on and as of the time of the completion thereof, July 1, 1944, had a valuation of $5,589,707. In the determination of the valuation of this plant for the tax year 1946 the appellant contends on the basis of some supporting evidence that 60% of the cost of constructing this plant consisting, as above noted, of a six case cracking unit and a three case cracking unit, was attributable to the six case cracking unit, and that 40% of the total cost was in the construction of the three case cracking unit. With this assumption the appellant ascribes a valuation to that part of the plant as personal property other than the three case unit and the foundations for the addition cases which were never constructed, or $3,353,824. Giving this stated valuation a depreciation of 15%, amounting to $503,073, the appellant determines the true value of the personal property in the Houdry plant other than the three case unit and the additional foundations a value of $2,850,751 as of January 1, 1946.

Further in this connection the appellant contends that aside from the fact, as claimed, that this Houdry catalytic cracking plant, which was of the fixed-bed catalytic type, was to some extent outmoded by January 1, 1946, by reason of the development and use in the industry of the fluid type of catalytic plant, the three case unit, it is contended, became obsolete on the termination of the war; and this for the reason, as claimed, that this unit was no longer needed for making high octane gasoline for aviation purposes and appellant could have refined motor vehicle gasoline more economically by the use of its thermal cracking unit and the six case cracking unit without making any use of the three case unit. And in this view the appellant contends, in effect, that the only value that the three case unit had on January 1, 1946, was such value as the unit might have in the contemplated conversion of the same into a catalytic cracking unit of the fluid type; and that the value of the three case unit was between $700,000 and $1,000,000.

Grouping this three case unit and the foundations of the once projected but never finished additional three case unit together, the appellant ascribes a value to the same of $1,000,000. Adding this sum to the determined true value of personal property in the Houdry plant other than the three case unit and such additional foundations, the appellant determines the true value of the Houdry catalytic plant as of January 1, 1946, to be $3,850,751.

In the consideration of the immediate question here presented it is noted that although this three case cracking unit in its normal operation processed a considerable quantity of virgin feed stock obtained both from the crude and vacuum pipe stills operated by the company at this refinery, the greater amount of feed stock which went into the three case unit was that which was obtained as an end product from both the thermal and six case cracking units; and that the chief purpose of the three case unit was to give the gasoline processed by it a higher octaine quality than the gasoline produced in either the thermal cracking unit or in the six case catalytic cracking unit. In this connection it appears from the evidence (appellant's exhibit 25A) that during the calendar year 1945, including nine months of the war period, the amount of feed stock of various kinds processed in this three case catalytic cracking unit was 4601 barrels; in the calendar year 1946, 4291 barrels; in the calendar year 1947, 4096 barrels; and during the first six months of the calendar year 1948, 3820 barrels. It appears that although following the end of the war there was a marked decrease in the demand for aviation gasoline there was at that time a greater increase in the demand for gasoline for motor vehicle use. And in meeting this demand the company as late as June 1948 was making a more active use of this three case cracking unit than was made of it during the last of the war years. In this situation the Board is not impressed by the contention of the appellant that on and as of January 1, 1946, this three case unit was obsolete and that it had no valuation other than such as it might have for conversion purposes. On the contrary we are of the view that on January 1, 1946, as on January 1, 1945, this three case unit should be consid-

ered as a part of the Houdry catalytic cracking plant as a whole and as an operating unit thereof.

Coming to the determination of the value of the Houdry catalytic cracking plant as personal property for the tax year 1945 and as of January 1 in said year, the Board has found herein that the value of the plant on and as of July 1, 1944, was and is the sum of $6,940,528. Giving to this valuation a depreciation of 15% covering the period of time between July 1, 1944, and January 1, 1946, and amounting to $1,041,089, the Board determines the value of this plant on and as of January 1, 1946, to be $5,899,439. Inasmuch as this valuation of the plant is slightly less than that determined by the tax commissioner in the final order complained of herein such final order is hereby modified in order to conform to the finding of the Board with respect to the valuation of this plant.

As before indicated herein the appellant's findings in cases Nos. 12488 and 14381 present questions relating to the assessment of certain unfinished machinery and equipment which was in process of construction at the appellant's Cleveland refinery on tax listing day for the tax years 1943, 1944, 1945 and 1946, respectively. As to the tax years 1943 and 1944, the only property of this kind here in question was the then unfinished Houdry catalytic cracking plant or unit, above referred to; and as to the tax years 1945 and 1946, the property in question was certain other capital equipment which was unfinished and in the process of construction on tax listing date in said respective years.

Upon considerations relating to the construction and application of sections 5328 and 5325-1, General Code, the appellant contends, as before noted, that personal property of this kind is not taxable at all; and, in the alternative, the appellant further contends that if it is determined that this property is taxable, it should be assessed, not as machinery and equipment, but either on the average basis as personal property of a manufacturer within the purview of sections 5385 and 5386, General Code, or as "idle equipment" and at 10% of the cost thereof pursuant to the tax commissioner's directive under date of May 6,

1943, relating to the assessment of property in this category. As before noted, the Board is of the view that the property here in question is taxable. And it remains for us to determine the manner in which this property should be assessed and the valuation of the same for purposes of taxation in said respective tax years. Appellant's contention that personal property of a manufacturer of this kind and in this condition should be assessed on the average basis provided for by sections 5385 and 5386, General Code, is predicated on the stated view that clause 4: "When stored or kept on hand as material, parts, products or merchandise" as the same is found in section 5325-1, General Code, defining the term "used" within the purview of section 5328, General Code, providing for the taxation of personal property "used in business," is intended to cover inventories of all kinds, and is coextensive with section 5385, General Code, which provides for the assessment on the average value basis: "* * * of all articles purchased, received or otherwise held for the purpose of being used, in whole or in part, in manufacturing combining, rectifying or refining, and of all articles which were at any time by him manufactured or changed in any way, * * *." As to this, we are of the view that the "articles" referred to in the above quoted provisions of section 5385, General Code, refers solely to articles from which and out of which the manufactured products are made—that is, the manufacturer's raw material or stock—Sebastian v. Ohio Candle Co., 27 O. S., 459, 463; Engle v. Sohn, 41 O. S., 691, 693; Commissioners v. Rosche Bros., 50 O. S., 103, 109; and the "articles" therein referred to do not, in our opinion, include machinery, tools or other equipment by means of which such articles as the manufacturer's raw material or stock are transformed, changed or otherwise used in the manufacture of the finished product. In this connection it is noted that section 5386, General Code, which makes provision as to the manner in which the average value of the personal property of the manufacturer, so assessed is to be determined, further provides as follows:

> "A manufacturer shall also list all engines and machinery of every description used, or designed to be

used, in refining or manufacturing, and all tools and implements of every kind used, or designed to be used, for such purpose, owned and used by such manufacturer."

This statutory provision is not only persuasive to the view that the property here in question which is "designed to be used" in refining and manufacturing, is taxable, but, read with the applicable provisions of section 5388, General Code, this provision leads to the view that property of this kind is to be assessed, not on the average value thereof, but upon the true value thereof as of tax listing day, and is to be listed at 50% of such true value.

The appellant further contends that if this unfinished machinery and equipment is not assessable on the average value thereof under the provisions of sections 5385 and 5386, General Code, then and in that event this property should be assessed as idle equipment at 10% of the original cost thereof under a directive of the tax commissioner under date of May 6, 1943, which is as follows:

"Subject: Valuation of Idle Equipment: Dated 5/6/43:

Such equipment shall, under certain conditions, be listed at 10% of original cost; such cost to include that of foundation and installation.

Temporary idleness for purpose of overhauling and repair or resulting from seasonable operations is not sufficient cause.

Equipment ordinarily entitled to such listing would be that in buildings boarded up, in departments closed off, or removed from production line.

To receive such consideration, the taxpayer must file a claim, in writing, at the time of filing the return.

Such claim should show cost and value as listed in the return and other necessary information in support of the claim."

As to the contention of the appellant it may be observed that aside from the question (not here decided) as to the authority of the tax commissioner to make and issue this directive—it is not a rule—in view of the requirement that

machinery and equipment is to be assessed on the basis of the true value thereof and listed at 50% of such true value, and aside from the obvious view that the property here in question does not come within either the letter or purpose of this directive, the appellant can not in these cases avail itself of this directive for the purpose intended, and this for the reason it did not in making its tax returns for the several tax years here in question make any claim that this property should be taxed as idle equipment.

It follows from what has been said that the Board is of the view that this unfinished machinery and equipment here in question is to be taxed as personal property and as is other machinery and equipment on the basis of the true value thereof on and as of tax listing day of the several tax years above referred to, and is to be assessed at a list valuation of 50% of such true valuation as prescribed by section 5388, General Code. As above noted, the only personal property of this description which is involved in this case with respect to the tax years 1943 and 1944 is the then unfinished Houdry catalytic cracking plant. As to this it further appears that on and as of January 1, 1943, the overall cost of that part of the plant represented by the personal property therein was $435,000. In this case it is noted that the Board in determining the true valuation of the then completed Houdry plant on and as of July 1, 1944, deducted from the overall cost of the plant that part thereof represented by excessive costs and expenses of the construction which did not contribute to the value of the plant, which excessive costs and expenses amount to $1,200,000—about 13.2% of the overall cost of the plant. Applying as a deduction the same percentage of overrun to the overall cost of the unfinished structure on and as of January 1, 1943, we determine the true value of the plant as of said date to be $377,580 (list value $188,790). On and as of January 1, 1944, the overall cost of the plant as personal property was $6,220,575. Deducting from this sum the same percentage of overrun for excessive costs and expenses in construction, the true value of the plant as of said date is determined to be the sum of $5,399,459 (list value $2,699,729). By January 1, 1945, the Houdry catalytic cracking

plant had been completed and was then in operation. However, the appellant company had at that time certain other unfinished equipment which was in progress of construction and to which the tax commissioner ascribed a true value for said tax year of $80,652, of which $41,716 was the value of that part of the property which was intended for use in manufacturing and which was assessed at 50% of such value, and $38,936 was regarded as the value of that part of the unfinished equipment which was intended for use other than manufacturing, and which was assessed at 70% of such value. There is nothing in the evidence to show that there was any overrun on account of excessive costs and expenses in the construction of this unfinished equipment; and the valuation placed upon the same by the tax commissioner is hereby determined to be correct. On January 1, 1946, the appellant had in process of construction certain then unfinished equipment the cost of which up to that time was $928,686 of which $904,651 represented the then cost of machinery intended to be used in manufacturing and which was assessed at 50% of such valuation and $24,055 represented that part of the unfinished equipment which was intended to be used for other purposes and which was assessed at 70% of valuation. There is no suggestion in the evidence than any part of the cost of constructing this equipment was due to an overrun of excessive costs and expenses not contributing to the value of the equipment. And the order of the tax commissioner determining the true value of the equipment in accordance with the figures above stated is hereby affirmed. Inasmuch as the true valuation of the unfinished Houdry catalytic cracking plant on and as of January 1, 1943, and January 1, 1944, respectively, as here determined, are somewhat less than the valuations of said property as of said respective dates, the order of the tax commissioner determining such valuations is hereby modified so as to conform to the findings of the Board. As to the unfinished equipment of the appellant which was in progress of construction on January 1, 1945, and January 1, 1946, the true valuations thereof as determined by the tax commissioner are hereby affirmed.

Case No. 14514, herein before referred to, is an appeal filed herein by the appellant above named under date of June 17, 1948, from a final assessment made by the tax commissioner under date of May 19, 1948, under the assumed authority of section 5395, General Code, on and with respect to tangible personal property of the appellant for the tax year 1945 including machinery and equipment and other tangible personal property at Cleveland refinery in Cleveland City Taxing District, Cuyahoga County, Ohio, the assessment of which property for said tax year as modified on the appellant's application for review and redetermination was confirmed by the tax commissioner by a final order of the tax commissioner under date of April 14, 1948, and from which order said appellant filed an appeal with this Board under date of May 13, 1948; which appeal was docketed as one of the appeals in case No. 14381, and is considered and determined herein. By reason of the provisions of section 5395, General Code, which excludes from the list of taxable property as to which a final assessment may be issued under the authority of this section "any taxable property concerning the assessment of which an appeal has been filed under section 5611 of the General Code," the Board is of the view that the tax commissioner was without authority to issue this final assessment on and with respect to machinery and equipment and other tangible property of the appellant in Cleveland City Taxing District, which was the subject of the appeal filed herein in case No. 14381, above referred to, and in this respect the final assessment and assessment certificate of the tax commissioner under date of May 19, 1948, is reversed, set aside and held for naught. This order is without prejudice to the issues with respect to the assessment of said personal property as the same has been considered and determined on the appeal for the tax year 1945 filed herein under date of May 13, 1948.

Except as otherwise indicated herein the orders and assessments complained of in these several appeals are affirmed; and the several cases above noted are remanded to the tax commissioner with directions to make and issue corrected assessment certificates in conformity with the findings and determinations of the Board made herein.

See memo attached.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation of Ohio this day made with respect to the above matter.

JOSEPH D. BRYAN,
Secretary.

[SEAL.]

SHERICK:

I concur in all matters decided, save and except that portion of the first question presented and determined, which has to do with the taxation of boats and barges transporting crude oil between Mississippi river points and Mt. Vernon, Indiana, and Bromley, Kentucky. Since the State of Kentucky owns to the north shore of the Ohio river at low water mark, and these boats and barges never docked in Ohio ports, such boats and barges never entered the State of Ohio during the taxing period. I am of equally firm opinion that the Board of Tax Appeals has no power or authority to declare all or any part of an Act of the Legislature unconstitutional. I feel that taxation of these vessels can only be sustained upon the words *"in navigating any of the waters* within or *bordering on this state, whether such ships, vessel, or boat is within the jurisdiction of this state or elsewhere,"* as found in G. C. Section 5325. To my notion any such purpose and intent to tax tangible personal property has already been held unconstitutional in the case of Floyd v. Light and Heat Co., 111 O. S., 57. The court therein was considering G. C. Section 5424 and the right, purpose and intent of the State of Ohio to tax tangible personal property sitused outside of Ohio. In broad and general terms the court therein said at pages 74 and 75:

> "Another important principle to be observed is that which forbids *any attempt* to levy taxes upon property beyond the territorial boundaries of the state. This is

a *general principle which has application to all forms of taxation.*"

"Upon principle as well as upon the authority of these cases we adhere to the doctrine that in the construction of Section 5424, General Code, *there must be no taxation of property not 'within this state.'*"

I fully realize that these observations are not carried into the syllabi, but the statements made are so uniformily the law of the land, and so broad and comprehensive in scope in condemning any such legislative purpose, intent and design in any statute enacted to that end, that what is therein said is as fully applicable to G. C. Sec. 5325 as it was to G. C. Sec. 5424. The very principle sought to be accomplished in G. C. Sec. 5325 was found therein not to be able of accomplishment. The words "*any attempt*" to my notion are synonymous with "*any statute which attempts.*"

I feel fortified in my conclusion by the statement of the court made in Columbus Met. Housing Auth. v. Thatcher, Aud., 140 O. S., 38. The court therein had this to say, on page 43 thereof, concerning the omission of the word "exclusively" from G. C. Sec. 5351, an exemption statute:

"The word 'exclusively' may not be read out of this section (5351) and *any statute which intentionally disregard this feature would be unconstitutional.*"

EXHIBIT D

Entry of the Tax Commissioner of Ohio—1945

DEPARTMENT OF TAXATION OF OHIO

No. 3,327

In the matter of the application for review and redetermination of THE STANDARD OIL COMPANY, Cleveland, Ohio, (Inter-County) for the year 1945.

April 14, 1948.

The application for review and redetermination of The Standard Oil Company, Cleveland, Ohio, an inter-county corporation, from an increased personal property tax assessment for the year 1945, after being duly heard, came on to be considered.

The Tax Commissioner being fully advised in the premises, finds that for the year 1945 assessment was made increasing the value of both personal property and intangible property over and above that as listed by the applicant as to items and amounts as follows:

Item	*Amount of Increase*
1. Average inventory values	$ 852,013.00
2. Net taxable credits	1,354,230.00

The Tax Commissioner finds that the average inventory values were increased by reason of the fact that applicant determined the values as listed under the "Lifo" or, last-in, first-out method, and by reason of such fact the values as listed and returned did not reflect true value and finds that the true value of said inventory for such year is as reflected in the increased assessment and said assessment as to the values so determined is hereby affirmed.

The Tax Commissioner further finds that the increase in net taxable credits over and above those as returned by said applicant was due principally to the fact that the applicant deducted taxes and annuities in determining the

net taxable credits as so listed and finds that the deduction thereof by the applicant was in error and such assessment as to the increase in net taxable credits is hereby affirmed.

The Tax Commissioner further finds that applicant listed watercraft (boats and barges) at the depreciated book value thereof in the amount of $1,017,518 but finds that by reason of excessive reserves having been accumulated the true value of said property was in excess of that as returned and finds that the true value of boats and barges taxable in Ohio for 1945 was $1,322,863.00.

Applicant did not file a claim for deduction with respect to said boats and barges at the time of making return, but in its application for review protested the assessment of said property on the basis that such property was not taxable in Ohio.

The Tax Commissioner finds that watercraft and aircraft belonging to persons residing in this state and not used in business wholly in another state are taxable in Ohio and orders that the true value of boats and barges in the amount of $1,322,863.00 be reflected in the final assessment certificate hereinafter ordered.

The Tax Commissioner being further advised in the premises, finds that personal property of the applicant other than boats and barges was listed at less than the true value thereof for the year 1945 in certain taxing districts, partially by reason of excessive reserves having been accumulated and partially by reason of applicant's failure to include in such listing, personal property in the process of construction and finds that the true value of personal property not returned by reason of excessive reserves was $739,022.00 and that $681,157.00 of such amount was personal property used in manufacturing and that $57,865.00 was personal property used other than in manufacturing, and that the true value of personal property in the process of construction and not returned was $41,716.00 for use in manufacturing and $38,936.00 for use other than in manufacturing.

The Tax Commissioner further finds that applicant listed personal property in the aomunt of $15,052,922.00 which

was $561,027.00 more than the net book value thereof and included in such listing in Cleveland district was machinery used in manufacturing consisting of a catalytic cracking unit.

Applicant in its review and redetermination and evidence submitted in support thereof maintains that in the valuation of its catalytic cracking unit the Tax Commissioner should make an allowance for excessive costs and also an allowance for the general inflated level of the cost index during the war emergency and further contends that by reason thereof the true value of such unit is $3,000,000.00 as of January 1, 1945. Applicant further contends that its boats and barges are not subject to personal property taxation under the Ohio laws.

The Tax Commissioner, being further advised in the premises, and consideration having been given to the claims made and evidence submitted by the applicant in support of said application for said year, finds that there is no authority in law or in long established administrative procedure for recognizing increased costs due to price increases in the determination of true value of personal property used in business; and that the claim of applicant in this regard should be and hereby is denied.

The Tax Commissioner finds that applicant at the time of filing its return did not file a claim in writing as provided in Section 5389, General Code, with respect to its machinery and equipment to the effect that the net depreciated book value was in excess of true value.

The Tax Commissioner further finds that the catalytic cracking unit was assessed in excess of the true value thereof in the amount of $988,000.00 by reason of allowable excessive costs and equipment not in use but that in view of the judicial determination (Willys-Overland Motors, Inc. *v.* Evatt, 141 O. S. 402) he is without jurisdiction to find a value below net depreciated book value and orders that the value of such property be reduced in the amount of $561,027.00 being the amount that the machinery and equipment used in manufacturing in Cuyahoga County exceeded the net depreciated book value thereof, and it is ordered that final assessment certificate issue correcting the assess-

ment in the amount so stated. In all other respects the assessment as to machinery and equipment is hereby affirmed and the Tax Commissioner finds that in the districts in which such incorrect listings were made or corrected herein, the true value of personal property used in manufacturing and used other than in manufacturing for such year, including boats and barges, was as follows:

		Amended True Values
Used in Manufacturing		
Allen County	—Shawnee Twp. Sch.	$794,961
	—Lima	365
Cuyahoga County	—Cleveland	10,977,441
Lucas County	—Oregon Twp.	3,442,001
Used Other Than In Manufacturing		
Cuyahoga County	—Cleveland	1,328,712
Portage County	—Randolph Twp.	6,306
	—Suffield Twp.	49,338
Summit County	—Franklin Twp. E. Sch.	15,650
	—Franklin Twp. W. Sch.	44,266
	—Green Twp.	34,656
	—Springfield Twp.	15,836
Wayne County	—Chippewa Twp.	18,436
Hancock County	—Washington Twp. Arcadia SD	20,414
Allen County	—Lima	42,502
Belmont County	—Martins Ferry	19,301
Carroll County	—Center Twp. Carrollton SD	211
Cuyahoga County	—Cleveland	635,891
Fayette County	—Washington C. H.	5,867
Callia County	—Gallipolis	11,701
Hamilton County	—Cincinnati	251,219
Mahoning County	—Youngstown	47,393
Muskingum County	—Zanesville	9,859
Richland County	—Mansfield	27,516
Summit County	—Akron	124,678
Other Counties	—Various	3,243,832

The Tax Commissioner, therefore, orders that final assessment be made for the year 1945 in conformity with and reflecting the findings herein.

Department of Taxation,
(Sgd.) C. EMORY GLANDER,
Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation, this day taken by the Tax Commissioner with respect to the above matter.

(Sgd.) C. EMORY GLANDER,
Tax Commissioner.

EXHIBIT E

Entry of the Tax Commissioner of Ohio—1946

DEPARTMENT OF TAXATION OF OHIO

No. 3276

In the matter of the application for review and redetermination of THE STANDARD OIL COMPANY, Cleveland, Ohio (Inter-county) for the year 1946

April 13, 1948.

The application for review and redetermination of The Standard Oil Company, Cleveland, Ohio, an inter-county corporation, from an increased personal property tax assessment for the year 1946, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that as to the year 1946 said applicant filed its return and thereafter increased assessment was made for such year and that such assessment reflected increases over and above those as returned by said applicant in the following respects:

Item	*Amount of Increase*
1. Average inventory values	$ 935,314.00
2. Net taxable credits	1,567,900.00

The Tax Commissioner finds that the average inventory values were increased by reason of the fact that applicant determined the values as listed under the "Lifo" or, last-in, first-out method, and by reason of such fact the values as listed and returned did not reflect true value and finds that the true value of said inventory for such year is as reflected in the increased assessment and said assessment as to the values so determined is hereby affirmed.

The Tax Commissioner further finds that the increase in net taxable credits over and above those as returned by said applicant was due principally to the fact that the

applicant deducted taxes and annuities in determining the net taxable credits as so listed and finds that the deduction thereof by the applicant was in error and such assessment as to the increase in net taxable credits is hereby affirmed.

The Tax Commissioner further finds that applicant listed machinery and equipment in Cuyahoga County for the year 1946 in the amount of $4,082,711.00 and that thereafter amended assessment certificate was issued in which the value of the machinery and equipment was increased over and above that as returned in the amount of $6,916,129.00, such increase being due to the failure of the applicant to list machinery and equipment consisting of a catalytic cracking unit; such unit having been fully reserved on the books of the applicant. Applicant also failed to list personal property with a true value of $741,979.00 by reason of excessive reserves having been accumulated and of which $938.00 was used in manufacturing and $163,868.00 was used other than in manufacturing and $577,173.00 was boats and barges. Applicant also failed to list personal property with a true value of $928,686.00 which was in the process of construction of which $904,651.00 was to be used in manufacturing and $24,035.00 was to be used other than in manufacturing.

At the time of filing its return, applicant filed a claim for deduction from book value in words and figures as follows:

		Schedule 2
"Cleveland City, Book Value		$3,142,425.00
Totals	Book Value	3,142,425.00
	Deduction Claimed	—
	Claimed True Value	6,991,741.00

"The depreciated book value figure of $3,142,425 given in Item 1 represents the depreciated book value of the Cleveland Refinery machinery and equipment shown on Schedule 2 of the return and includes the Catalytic Cracker (Houdry unit) at Cleveland at a book value of ZERO, for the reason that the book value of this unit through depreciation (including amortization) was reduced to ZERO by January 1, 1946. Should

the depreciated book value of this Houdry Unit be properly deemed higher than ZERO within the meaning of G. C. 5389, then the figure of $3,142,425.00 is to be treated as increased by such excess over ZERO, and the deduction claimed shall be not ZERO, but the excess of such increased figure over the true value of the refinery personalty of $6,991,741 above mentioned.

"The supporting data with respect to the above claim are already in the possession of the Department of Taxation.

"Statement Forming Part of the Return

"In connection with the return to which this is attached we wish to call attention to the fact that the return shows a total true value for the Cleveland Refinery machinery equipment in Schedule 2 of $3,991,741. This amount should be increased by $3,000,000 to reflect and include the true value of the Houdry unit above mentioned bringing the aggregate true value of Schedule 2 to $6,991,741.00."

Applicant maintains that in the valuation of its catalytic cracking unit the Tax Commissioner should make an allowance for excessive costs and also an allowance for the general inflated level of the cost index during the war emergency and further contends that by reason thereof the true value of such unit is $3,000,000.00 as of January 1, 1946. Applicant further contends that its boats and barges are not subject to personal property taxation under the laws of Ohio.

The Tax Commissioner, being further advised in the premises, and consideration having been given to the claims made and evidence submitted by the applicant in support of said application for said year, finds that there is no authority in law or in long established administrative procedure for recognizing increased costs due to price increases in the determination of true value of personal property used in business; and that the claim of applicant in this regard should be and hereby is denied.

The Tax Commissioner further finds that in the amended assessment certificate heretofore issued the catalytic cracking unit was assessed in excess of the true value thereof in the amount of $932,360.00 by reason of allowable excessive costs and equipment not in use and finds that the true value of said catalytic cracking unit as of January 1, 1946 was $5,983,769.00 and further finds that boats and barges were properly assessed as having taxable situs in Ohio and likewise finds that there was no error in the assessment of the personal property which taxpayer failed to list by reason of excessive reserves having been accumulated and further finds that there was no error in the assessment of personal property in the process of construction and the assessment as heretofore made as to such property is hereby affirmed.

In view of the foregoing, the Tax Commissioner finds that in the districts in which such incorrect listings were made, the true value of personal property used in manufacturing and used other than in manufacturing for such year, including boats and barges, is set forth as to amounts in the districts in the schedule below:

		Amended True Values
Used In Manufacturing		
Allen County	—Shawnee Twp. Shawnee RSD	$778,163
Cuyahoga County	—Cleveland	10,960,267
Lucas County	—Oregon Twp.	3,226,760
Used Other Than In Manufacturing		
Cuyahoga County	—Cleveland	1,354,493
Portage County	—Randolph Twp.	5,701
	—Suffield Twp.	44,883
Summit County	—Franklin Twp. E. Sch.	14,301
	—Franklin Twp. W. Sch.	43,859
	—Green Twp.	31,478
	—Springfield Twp.	14,169
Wayne County	—Chippewa Twp.	16,618
Hancock County	—Washington Twp. Arcadia R. S. D.	49,013
Cuyahoga County	—Cleveland	670,989
	—Brecksville	5,803
	—Euclid	11,049
	—Chagrin Falls	5,607
Defiance County	—Defiance	3,040
	—Hicksville	3,792
Fairfield County	—Lancaster	7,711
Franklin County	—Columbus	112,936
Fulton County	—Wauseon	3,003
	—Fayette	2,722
Geauga County	—Chardon	3,307

Hamilton County	—Cincinnati	239,683
Henry County	—Napoleon	3,839
Jefferson County	—Steubenville	15,477
Lake County	—Painesville	8,118
Lawrence County	—Ironton	6,732
Lucas County	—Maumee	6,273
	—Toledo	161,704
Ross County	—Chillicothe	8,715
Scioto County	—Portsmouth	64,413
Summit County	—Akron	114,858
Williams County	—Bryan	4,381
Wood County	—Grand Rapids	4,666

The Tax Commissioner further finds that in all other respects the assessment as heretofore made is correct and it is ordered that final assessment certificates issue reflecting the above findings.

DEPARTMENT OF TAXATION,
(Sgd.) C. EMORY GLANDER,
Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation this day taken by the Tax Commissioner with respect to the above matter.

(Sgd.) C. EMORY GLANDER,
Tax Commissioner.